©BNA's Law Reprints, Inc: U.S. Supreme Court Records and Briefs

Petition

81-736

No.

Office - Supreme Court, U.S.
FILED
OCT 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor in Interest by Merger to St. Louis-San Francisco Railway Company,
Petitioner,

vs.

RONALD E. DUNN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

DONALD E. ENGLE
ERIC A. CUNNINGHAM, JR.
DANIEL M. BUESCHER
906 Olive Street
St. Louis, Missouri 63101
Attorneys for Petitioner.

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

Although it is settled that the measure of damages in state, as well as in federal, court actions under the Federal Employers Liability Act (FELA) is a matter of federal substantive law, Missouri courts have consistently refused to apply the federal substantive law of damages under the FELA to FELA actions tried in the state courts of Missouri. This case presents two important questions resulting from that refusal:

1. Whether, in a FELA action tried in state court prior to this Court's decision in *Norfolk and Western Railway Company* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), but decided on appeal subsequent to *Liepelt,* the Missouri Supreme Court may refuse to apply the rule of *Liepelt* and thereby deny Petitioner's right to have the jury instructed that any award to Respondent (plaintiff) would not be subject to income taxation.

2. Whether the trial court, because of the Missouri Supreme Court's mandatory instruction practice under the Missouri Approved Instructions (M.A.I.), may deny Petitioner's rights under the FELA law of damages to have the jury instructed that any award for lost future earnings must be reduced to "present value"?

TABLE OF CONTENTS

	Page
Questions Presented	i
Introductory Statement	1
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement Of The Case	3
How The Federal Questions Were Presented	4
Reasons For Granting The Writ	7
Conclusion	14

Appendices:

A.	Original Opinion of the Missouri Court of Appeals, St. Louis District	A-1
B.	Opinion of the Missouri Court of Appeals, St. Louis District Upon Rehearing	A-19
C.	Opinion of the Missouri Supreme Court	A-43
D.	Order Denying Rehearing	A-64
E.	Instruction Conference	A-65
F.	Excerpts From Record	A-75
G.	Excerpts From M.A.I.	A-80

TABLE OF CITATIONS

Cazad v. Chesapeake and Ohio Railway Co., 622 F.2d 72 (4th Cir., 1980) 7

Chesapeake and Ohio Railroad Co. v. Kelly, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916) 11,12

Crabtree v. St. Louis-San Francisco Railway Co., 89 Ill.App.3d 35, 411 N.E.2d 19 (1980) 9

Flannigan v. Burlington Northern Inc., 632 F.2d 880 (8th Cir., 1980) 8,10,11

Ingle v. Illinois Central Gulf Railroad Co., 608 S.W.2d 76 (Mo.App., 1980) 10,11

Lang v. Texas and Pacific Railway Co., 624 F.2d 1275 (5th Cir., 1980) 8

O'Byrne v. St. Louis Southwestern Railway Co. v. Union Tank Car Co., 632 F.2d 1285 (5th Cir., 1980) 9,11

Oltersdorf v. Chesapeake & Ohio Railroad Co., 83 Ill. App.3d 457, 404 N.E.2d 320 (1980) 10

Raines v. New York Central R.R., 5 Ill.2d 438, 283 N.E. 2d 230, cert. denied, 409 U.S. 983 (1972) 7

Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 1 L.Ed. 493, 77 S.Ct. 443 (1957) 12

Seaboard Coast Line Railroad Company v. Yow, 384 S. 2d 13 (Ala., 1980) 10

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor in Interest by Merger to St. Louis-San Francisco Railway Company,
Petitioner,

vs.

RONALD E. DUNN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

INTRODUCTORY STATEMENT

Burlington Northern Railroad Company, Successor in interest by merger to St. Louis-San Francisco Railway Company, petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Missouri.

OPINIONS BELOW

Neither the original opinion of the Missouri Court of Appeals, St. Louis District, dated February 15, 1980, nor its opinion on rehearing dated August 12, 1980, will be reported; but

both opinions are appended hereto as Appendix A, pages A1 to A18 and Appendix B, pages A19 to A42, respectively.

The opinion of the Supreme Court of Missouri is unreported as of the date of filing of this petition, but said opinion bears Number 62428 and is appended hereto as Appendix C, pages A43 to A63.

JURISDICTION

The judgment and opinion of the Supreme Court of Missouri was entered on June 8, 1981. Petitioner's timely Motion For Rehearing was denied on July 14, 1981, by the Supreme Court of Missouri, but further proceedings were stayed by that Court on September 8, 1981, pending final action by this Court on Petitioner's Petition for a Writ of Certiorari. This petition was filed within 90 days of the denial of Petitioner's Motion for Rehearing.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

35 Stat. 65, as amended, 45 U.S.C. §51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury

while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT OF THE CASE

Respondent, Ronald E. Dunn, an employee of Petitioner's predecessor in interest, the St. Louis-San Francisco Railway Company (hereinafter called "Frisco" or "railroad"), brought this action under the Federal Employers Liability Act, 45 U.S.C. §51, (FELA), to recover damages for injury to his back which Respondent sustained while working as a journeyman carman at Frisco's Fort Smith, Arkansas car repair facilities on October 23, 1974. Subsequently, Respondent's injury resulted in the surgical removal of a ruptured disc from his back.

At trial, Respondent introduced evidence of Petitioner's negligence which, although contested, was decided adversely to Petitioner by the jury and is no longer in issue. Respondent also presented evidence of the nature of his injuries, treatment, surgery, and present inability to perform the heavy labor required of a carman. On the issue of damages, Respondent indicated that he was presently self-employed as a welder and introduced evidence of the wages for several years paid to the men close to Respondent on the carmen's union seniority roster at Frisco (A75 to A76).

Without further evidence on damages, Respondent's counsel used the wage figures and the medical evidence restricting Respondent to "light work" to argue for compensation for Respondent for the rest of his life (Record at page 785, A-76); for the next forty years (Record at page 786, A-76); and concluded by requesting the sum of $375,000 (Record at pages 786, 816, A-76,78).

At the close of the trial, the judge instructed the jury, among other things, that if they found for the plaintiff (respondent), they "must award the plaintiff such sum as you believe will fairly and justly compensate the plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future . . . " (A-72). The jury was also instructed to diminish the award in proportion to the amount of plaintiff's (Respondent's) contributory negligence, if any. However, the judge refused to instruct the jury that any award would not be subject to income taxes (Refused Instruction C, A-73); and, likewise, the judge refused to instruct the jury that any award for future lost earnings must be reduced to present value (Refused Instruction E, A-74). The jury returned a verdict of $275,000.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

Petitioner asserted its federal claims at every level of the Missouri Court System.

At trial, Petitioner's counsel submitted Instructions C and E, among others. Instruction C indicated that the award would not be subject to income tax while Instruction E required the jury to reduce any award for future lost earnings to present value (Record at pages 774-775, A-73; A-74). Both Instructions C and E, as well as others submitted by Petitioner's counsel, were refused by the court (Record at page 764, A-65), which refusal, although not required by Missouri practice, was specifically objected to by Petitioner's counsel (Record at page 764, A-65).

Moreover, although the court refused these two instructions, Petitioner's counsel specifically proposed to argue the nontaxability of the award and present value to the jury; these proposals were objected to by Respondent's counsel and sustained by the court (Record at pages 765-767; A-66 to A-67).

Following the verdict, Petitioner's counsel again raised the same issues in his motion for directed verdict or, in the alternative, for a new trial (Record at pages 822-823, A-78. The judge, however, reaffirmed his prior position and denied both Petitioner's motion for directed verdict and the alternative motion for a new trial (Record at page 882, A-79).

The income tax and present value questions were again raised before the Missouri Court of Appeals, St. Louis District, by Petitioner in its Statement, Brief and Argument as points IV, V, and VI. Although the Court of Appeals, Division 4, initially reversed this case and remanded it for a new trial on other grounds, it considered the income tax and present value points and decided them adversely to Petitioner (A-10 to A-13). On rehearing, the Court of Appeals, en banc, again reversed and remanded on the other non-federal grounds. This Court's decision in *Norfolk and Western Railway Company* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), was handed down after the Divisional opinion was rendered and, although the Court of Appeals, en banc, requested that the parties brief the question of whether *Liepelt* applied, the Court did not decide the point upon rehearing in view of its decision on the non-federal issue. However, the Court did again decide the present value issue adversely to Petitioner (A-31). Chief Judge Dowd, who dissented from the majority opinion of the en banc decision of the Court of Appeals on rehearing, ordered the case transferred to the Supreme Court of Missouri (A-42). Again, Petitioner's counsel preserved the federal questions concerning Petitioner's right to have the jury instructed on "present value"

and the nontaxable nature of the award. These points, including the retrospective application of the *Liepelt* decision, were presented in Petitioner's brief and reply brief on transfer (A-55-58).

Following the filing of the Opinion of the Missouri Supreme Court on June 8, 1981, Petitioner filed its motion for rehearing which again raised the questions of Petitioner's right to have an income tax instruction and a present value instruction (A-78). That motion for rehearing was denied by the Missouri Supreme Court on July 14, 1981.

REASONS FOR GRANTING THE WRIT

1. The Decision Of This Court In Norfolk And Western Railway Company v. Liepelt, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), Should Be Applied Retroactively In This Case.

Following the Court's decision in *Norfolk and Western Railway Company* v. *Liepelt,* 444 U.S. 490, 100 S.Ct. 775, 62 L.Ed.2d 689 (1980), there can be no doubt that a defendant, like Petitioner, in a FELA case is entitled to a jury instruction that any award made by the jury is not subject to income tax. Since this right is a matter of federal substantive law, it follows that such an instruction must be given whether the FELA case is tried in federal or state courts. The only question remaining on this point in the instant case is whether the *Liepelt* holding applies to cases tried before the *Liepelt* decision was handed down on February 19, 1980, but decided on appeal after that date.

Prior to *Liepelt,* the Illinois Supreme Court had clearly taken the opposite position; that is, a cautionary instruction on income taxes was not allowed. See, for example, *Raines* v. *New York Central R.R.,* 5 Ill.2d 438, 283 N.E.2d 230, *cert. denied,* 409 U.S. 983 (1972). In spite of that, this Court applied the new rule to the plaintiff in *Liepelt.*

Since the time that the decision in *Liepelt* was entered, at least four federal courts and four state courts have dealt with the retroactive application of the *Liepelt* rule to cases such as this one.

In *Cazad* v. *Chesapeake and Ohio Railway Co.,* 622 F.2d 72 (4th Cir., 1980), the United States Court of Appeals for the Fourth Circuit applied *Liepelt* retroactively in a case which involved a railroad mechanic who received serious and disabling injuries from falling into an uncovered drain culvert. The defendant in *Cazad* had offered an instruction similar to the one that

had been offered in *Liepelt*. Although the plaintiff had received a jury verdict of $284,000, the Fourth Circuit reversed stating that the decision in *Liepelt* "is controlling in this F.E.L.A. case and mandates reversal." *622 F.2d at 76.*

Likewise, the United States Court of Appeals, Fifth Circuit, stated in *Lang* v. *Texas and Pacific Railway Co.*, 624 F.2d 1275 (5th Cir., 1980), at 1279-1280:

> Nor do we agree with appellate that *Liepelt* should not have retroactive effect. Our duty is to apply the law in effect at the time we render our decision unless to do so would result in "manifest injustice". *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711-15, 94 S.Ct. 2000, 2016-2018, 40 L.Ed.2d 476 (1974); *Thorpe* v. *Housing Authority,* 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969); *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801). We do not find that retroactive application of *Liepelt* to this case will result in manifest injustice.

That holding resulted in the reversal of a $600,000 judgment in favor of the widow and personal representative in a FELA case and a remand for new trial because the trial court had refused a requested instruction on the lack of income taxation on the award. As was true in Illinois courts, the Fifth Circuit had held prior to *Liepelt* that the "income tax" instruction should not be given.

Similarly, the Eight Circuit Court of Appeals in *Flannigan* v. *Burlington Northern Inc.*, 632 F.2d 880 (8th Cir., 1980), at 888-889, specifically held that *Liepelt* should be given retroactive application. However, in *Flannigan,* the Eighth Circuit did not hold that the trial court's failure to give the requested income tax instruction was reversible or prejudicial error under the circumstances of that case because, unlike *Liepelt,* the evidence in *Flannigan* fully supported the jury's verdict and indicated that the jury was not operating under any misconceived

notions of the tax law. In this case, however, even the Eighth Circuit's reasoning cannot apply since there was practically no evidence of the total damages nor in this case was the jury required to reduce future wage loss to present value.

The Fifth Circuit Court of Appeals took a different view from the Eighth Circuit regarding whether *Liepelt* requires a finding of an inflated verdict as a condition precedent to reversal. In *O'Byrne* v. *St. Louis Southwestern Railway Co.* v. *Union Tank Car Co.*, 632 F.2d 1285 (5th Cir., 1980), the plaintiff argued that there was no reason to believe from the evidence and subsequent award that the jury had inflated the award, while the defendant railway company using its view of the evidence contended that it showed the award was obviously inflated. The Court stated, however, in *O'Byrne, supra,* at 1287:

> Regardless of whose figures are the more correct, *Liepelt* did not require the demonstration of an erroneously inflated award in order to find reversible error in the denial of the requested instruction. "Whether or not this speculation [it surely is not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the federal government in taxes and that, therefore, it improperly inflated the recovery] is accurate," *Liepelt, supra,* 444 U.S. at 495, 100 S.Ct. at 759, the Supreme Court remanded *Liepelt's* claim for retrial with proper jury instructions. Undeniably, in *Liepelt,* the gap between the jury award and the amount computed by plaintiff's expert witness for lost earnings was more substantial than the same gap here, but the size of the gap does not appear to be a significant factor in the *Liepelt* holding.

In a similar vein, one of the aforementioned state courts rejected a comparable argument in *Crabtree* v. *St. Louis-San Francisco Railway Co.*, 89 Ill.App.3d 35, 411 N.E.2d 19 (1980), at page 24, where the court said:

> We believe that the plaintiff reads the decision in *Liepelt* too narrowly when he fixes on the words "in this case" in suggesting that the decision was only intended to apply to a case where the size of the award suggested strongly that the jury was influenced by income tax considerations.

The case of *Oltersdorf* v. *Chesapeake & Ohio Railroad Co.*, 83 Ill.App.3d 457, 404 N.E.2d 320 (1980), also held that *Liepelt* required reversal of plaintiff's verdict in a FELA personal injury action where the court refused a requested instruction that the award was not subject to taxation. The Illinois Court in *Oltersdorf* specifically rejected plaintiff's attempt to distinguish *Liepelt* on the basis that it applied only to wrongful death cases under FELA.

The Supreme Court of Alabama likewise applied *Liepelt* retroactively in *Seaboard Coast Line Railroad Company* v. *Yow*, 384 S.2d 13 (Ala., 1980). In that case, not only had the trial occurred before the *Liepelt* decision but, in fact, the case had been argued on appeal prior to the *Liepelt* decision. Nevertheless, the Alabama Supreme Court reversed plaintiff's $75,000 judgment and remanded the case for a new trial. *Yow, supra,* at page 14.

Only in the instant case and in the case of *Ingle* v. *Illinois Central Gulf Railroad Co.*, 608 S.W.2d 76 (Mo.App., 1980), has a court, according to Petitioner's research, refused to apply the *Liepelt* holding retroactively. Not surprisingly, both cases were decided by Missouri courts. Even the Eighth Circuit Court of Appeals criticized the *Ingle* holding in its *Flannigan* decision. See *Flannigan, supra,* at page 888. Moreover, the *Ingle* case can be easily distinguished from the instant case on at least one very important point: The FELA defendant in *Ingle* did tender or request an income tax instruction until after the jury had been deliberating for some time. This did not occur in the instant case. Petitioner timely requested the income tax instruction and the same was refused. Although transfer of the *Ingle* case to the

Missouri Supreme Court was denied as was a petition for writ of certiorari to this Court, Missouri courts should not be permitted to deny a FELA defendant's substantive federal rights under *Liepelt* merely by citing the *Ingle* holding, as was done in this case (A-58), when the income tax instruction was not even requested in *Ingle* and, thus, the federal question not preserved at trial.

Because the different interpretations of *Liepelt* between the circuits, e.g. the Fifth Circuit in *O'Byrne, supra,* and the Eighth Circuit in *Flannigan, supra,* have resulted in a conflict between the circuits and also because of the denial of Petitioner's substantive rights under *Liepelt,* the petition should be granted.

2. The Trial Court In This Case Should Have Given Petitioner's Requested Instruction E Which Would Have Required The Jury To Reduce Any Award For Future Lost Earnings To Present Value.

This Court in the *Liepelt* opinion, *supra,* at 100 S.Ct. 757, specifically recognized that ". . . federal courts have consistently . . . required that the estimate of future earnings be reduced by 'taking account of the earning power of the money that is presently to be awarded.' " Citing *Chesapeake and Ohio Railroad Co.* v. *Kelly,* 241 U.S. 485, 489, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916).

Missouri state courts have just as "consistently" refused to follow this Court's holdings on the substantive federal law of damages in FELA cases. The Missouri Supreme Court has mandated, by its Rule 70, that only Missouri Approved Instructions (M.A.I.) shall be given when M.A.I. contains an instruction applicable in a given case (A-80). Because an M.A.I. instruction (namely, No. 4.01, modified by M.A.I. 32.07) on contributory negligence was given in this csae as Instruction 7 (A-72), the trial court in accordance with M.A.I. rules refused to give Petitioner's requested Instruction E which would have required the jury to limit any award for future lost earnings to its present value.

Petitioner's right under federal substantive law to have the jury so instructed was well settled by this Court in *Chesapeake and Ohio Railroad Co.* v. *Kelly, supra.* In spite of this well-settled rule, the courts of the State of Missouri adamantly and steadfastly refuse to recognize the authority of this Court and other superior federal courts on matters of substantive federal law. This blatant refusal to acknowledge federal authority in FELA cases is plainly evident in the manner in which the Missouri Court of Appeals and the Supreme Court of Missouri seemingly dismissed Petitioner's assignment of error concerning the proferred present value instruction (A-12, A-31, A-57-58). The Missouri courts merely stated in essence that Instruction 7 was given (which contains no present value limitation), and M.A.I. does not permit any further explanation of damages. In other words, M.A.I. is omnipotent, even to the point of denying a FELA defendant its substantive federal rights set forth in the decision of this Court.

The opinions of the Missouri courts appended hereto contain only the explanation that the "form of instruction and manner in which the substantive law is submitted to the jury in a FELA case are procedural matters governed by state law." (A-57-58). The case of *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 1 L.Ed. 493, 77 S.Ct. 443 (1957), was cited as authority for that proposition. *Rogers,* however, does not stand for the proposition that the substantive federal law need not be instructed upon even though requested.

Following *Liepelt,* even the Supreme Court of Missouri recognized the authority of this Court as set forth in that decision by amending the damage instruction under M.A.I. to include notice to the jury that the award is not subject to income tax. The refusal to recognize the same authority of this Court in reference to requiring a "present value" instruction such as Petitioner's proferred Instruction E cannot be explained. Missouri may well be the only jurisdiction refusing such an instruction.

To paraphrase the petitioner in *Liepelt*:

> It is ... clear that if, as petitioner maintains, the courts that prohibit consideration of [a present value instruction] are impermissibly inflating damages awards, only a decision from this Court can afford relief. Indeed, because the FELA gives plaintiff extraordinary forum shopping opportunities, which are enhanced because removal of any case is prohibited, it is predictable that most major lawsuits will, until this Court acts, be tried in courts like those of [Missouri] which require the inflated verdicts. *Liepelt, supra,* Petition for Writ of Certiorari, at pages 17-18.

This Fort Smith, Arkansas plaintiff is a prime example of the abuse suggested by the Petitioner in *Liepelt*.

In order to make Missouri courts conform to the substantive federal law of damages in FELA cases, this Petition for Writ of Certiorari should be granted.

CONCLUSION

For the same reasons that the writ was granted in *Liepelt*, i.e., the conflicting interpretation of the lower courts and the inconsistency of the Missouri decisions below with the decisions of this Court, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DONALD E. ENGLE
ERIC A. CUNNINGHAM, JR.
DANIEL M. BUESCHER
906 Olive St.
St. Louis, MO 63101
Attorneys for Petitioner.

October 1981

APPENDIX

APPENDIX A

In The Missouri Court Of Appeals
Eastern District

Division Four

No. 40164

Ronald E. Dunn,
Respondent,

vs.

St. Louis-San Francisco
Railway Company, a Corporation,
Appellant.

Appeal from the Circuit Court
City of St. Louis

Hon. William A. Geary, Jr.,
Judge

Opinion Filed:

February 5, 1980

The case reaches the writer on reassignment after an opinion prepared by Dowd, P.J. failed of acceptance. Because the majority disagrees with only one point dealt with therein the following opinion is largely that prepared by Judge Dowd.

This is an action for damages under the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C.A. 51 *et. seq.*, Defendant appeals from a judgment entered for plaintiff as a result of a jury verdict for $275,000. Plaintiff sustained injuries while performing his job as an apprentice carman for defendant, St. Louis-San Francisco Railway Company.

Plaintiff was employed by defendant in Fort Smith, Arkansas as an apprentice carman and had completed one and one-half years of a four year apprenticeship. A carman rebuilds and repairs boxcars, tankcars, and flatcars. In the course of his job, a carman repairs wheels, gears, brakes and removes the wooden lining from the interiors of boxcars.

Boxcar lining is built of tongue and groove boards or of plywood sheets and isnailed to stringers in the ends of the boxcars. A stringer is a four by four oak wooden board. Its length is equal to the width of a boxcar. Stringers are bolted horizontally to the steel interiors of the boxcars. Each railroad company lines its cars with slightly different materials.

The wooden boxcar lining is removed, or "pulled", on K-1 track at defendant's facility in Fort Smith. As cars from various railroads enter the train yard, an inspector routes them to designated tracks for appropriate repairs.[1] The lead carman then marks lining to be pulled from the cars assigned to K-1 track.

At the time of plaintiff's injury a carman was given two tools to pull the lining, a crowbar and a five to six foot long lining bar, weighing twenty-five pounds and having a foot at one end. These tools performed adequately to pinch, pry or pull, except when the lining of cars for the Atchison, Topeka & Santa Fe Railroad needed removal. The lining of the Santa Fe cars was built of two plywood sheets one inch thick, four feet wide and ten feet long, with thirteen inch strips between, and was attached with 200-300 heavy screwnails.[2] Often, two men working

---

[1] Frisco billed the other railroads for these repairs.

[2] The number and type of nails was sharply disputed. Our factual statements are essentially based upon the evidence most favorable to plaintiff, and in some cases is disputed. We do not view the factual disparities as important to the issues presented on appeal.

together could not remove the lining from Santa Fe cars. Lining bars had been bent in the removal process. The employees had complained for years about the problems and hazards of removing this type of lining. The carmen complained at their periodic safety meetings of the inadequacy of the tools furnished, but no other tools were provided by Frisco for Santa Fe cars. There was evidence pro and con on whether there were any other types of tools which could be utilized to do the job better or more easily. In fact the plaintiff had been previously injured in removing the same type of lining with the tools provided. The lining was very hard to impossible to remove. The employees had to "strain their guts" to pull this lining off, using their back, legs and arms. Sometimes the carmen would ask a laborer to run the forklift to assist in the pulling of lining.[3] A clamp and chain were attached to the plywood lining, and the power of the hydraulic system of the forklift pulled it. However, the forklift was not always available, and the carmen's supervisors discouraged its use. Defendant's evidence was that some supervisors considered the use of a forklift for this purpose dangerous.

It was also established that it is not always necessary to remove this type lining at all. There was a method whereby the existing lining could be covered with new lining, but sometimes the lining must be removed in order to make other repairs.

On the date of his injury, Wednesday, October 23, 1974, plaintiff had removed the lining from four boxcars before he and journeyman carman Gary Marshall began work on a Santa Fe car. When he realized it was the heavy lining, plaintiff asked his supervisor, lead carman Leo Moss, for a forklift. However, Moss told him to use the lining bar. Plaintiff inserted his lining bar three feet from the floor, placed one foot on the floor and the other foot on the end wall, in a crouched position, and pulled. He then felt a sharp, shooting pain in his lower back. He tried to

---

[3] By union contract, only a laborer could operate the forklift.

stand up, but was unable to rise to a straight, upright position. He told Gary he was hurt, rested ten minutes, then returned to pulling the lining. Thinking the pain would eventually abate, he worked Thursday and Friday on a different assignment, checking and adjusting air brakes on the cars. Plaintiff did not report the injury to his supervisors or seek medical assistance on the job because he feared reprisal for reporting an on-the-job injury. There was evidence that it was known to other employees, including supervisors that he had been injured. After bedrest during the weekend, plaintiff reported for work on Monday. He culd not work due to pain, was hospitalized, and eventually a ruptured disc was removed surgically.

Defendant's first contention upon appeal is that the trial court erred in admitting certain deposition testimony given during defendant's recross examination of one of defendant's employees whose job had included pulling the lining from boxcars. The challenged testimony consists of the employee's opinion that defendant often needlessly replaced good quality lining with poor quality lining at the time of plaintiff's accident. Upon appeal, defendant contends the challenged evidence was not material or relevant to the issues of defendant's negligence and prejudiced defendant by making defendant appear dishonest.

Plaintiff contends initially that the matter has not been preserved. The objection at trial was lengthy but can be summarized as a contention of irrelevance because the evidence was beyond the scope of the pleadings. The same objection was carried forward into the motion for new trial. On appeal defendant again contends the evidence was irrelevant to the pleaded issues and further asserts that this caused "the defendant to be placed in a bad light, in short, to appear crooked, in the eyes of the jury on a false issue which was neither pleaded nor relevant to the case." This is not a change of theory as contended by plaintiff. Throughout defendant has asserted that the evidence was not relevant to the pleaded issues. On appeal defendant has asserted the same contention and added to it a reason why the

admission of the evidence was prejudicial. This is clearly proper. At trial an objection need only bring to the court's attention the legal ground upon which the objection is based. If the legal ground is correct the evidence should be excluded. On appeal the court must decide not only whether the evidence should have been excluded, but also whether the failure to so exclude it was prejudicial. It is not a change of theory to set forth in the "points relied on" not only the legal ground for the objection but the prejduce which arose from the error of admitting it. Luechtefeld v. Marglous, 151 S.W.2d 710 (Mo. App. 1941) [1-4]. That is what defendant has done here.

Plaintiff originally offered into evidence the redirect examination on deposition of defendant's employee. The court sustained an objection to this evidence. Plaintiff then offered the re-cross examination covering the same subject matter. The court overruled an objection to this evidence, apparently on the ground that such testimony had been elicited by defendant at the deposition. In Kane v. Metropolitan Life Ins. Co., 73 S.W.2d 826 (Mo. App. 1934) [6,7], it was recognized that cross-examination on deposition may cover all subjects encompassed by the direct examination, even though the testimony on direct was objectionable without constituting a waiver to the objectionable testimony. This is because depositions are taken without judicial supervision and a litigant must protect himself against the possibility that evidence which he considers objectionable may not be so viewed by a judge during the trial. This is apparent from our Rules covering depositions. *See* Rules 57.03(d) and 57.07(c) and (d). The evidence complained of did not become admissible (if otherwise objectionable) because it was elicited by defendant on cross-examination at deposition.

Plaintiff alleged negligence by defendant in four specific areas: (1) failure to provide safe working conditions, (2) failure to provide safe methods of work, (3) failure to provide safe equipment and work tools, and (4) failure to provide adequate help. The testimony complained of was that defendant had on

occasions removed end lining which was good and sometimes had replaced it with bad end lining. Plaintiff testified that the lining in the car he was working on at the time of his injury looked good. There was evidence, uncontradicted, that it was necessary on occasion to take out good lining in order to make other repairs on the cars.

We are unable to find any relevance between the four asserted grounds of negligence and the testimony objected to. Evidence is relevant if the fact it tends to establish in turn tends to prove or disprove a fact in issue, or to corroborate evidence which is relevant and which bears upon the principal issue. Charles F. Curry & Co. v. Hedrick, 378 S.W.2d 522 (Mo. 1964) [18,19]. Whether or not the railroad on occasion unnecessarily removed end lining does not fall under any of the pleaded charges of negligence, either directly or inferentially. The evidence pertained to a management decision about whether the work should be done at all, not the method or way in which it was to be done. We need not decide whether F.E.L.A. applies to possible negligence in management decisions about what work needs to be done, if such negligence was pleaded. Here it has not been pleaded. There is further no correlation between the claimed company policy and plaintiff's injury. The evidence did not establish that the end lining in the car in which plaintiff was injured was being unnecessarily removed. The evidence of the plaintiff affirmatively established that the employees were allowed whatever time was needed to complete the particular job—the number of cars to be worked on did not determine the working conditions, methods, tools or help involved. There was no attempt to show that the danger of injury was increased because end lining was unnecessarily removed from some cars. The evidence was not relevant to the pleaded issues and objection thereto should have been sustained.[4]

---

[4] Plaintiff also contends the evidence was relevant to the question of contributory negligence pleaded by defendant. We are unable to understand how. There was no dispute that plaintiff was directed to

We turn to the question of prejudice. Irrelevant evidence is objectionable because it tends to draw the minds of the jury away from the point at issue and misleads it into consideration of a false issue. Luechtefeld v. Marglous, *supra*. In this case the objected to testimony was linked with evidence that the defendant billed other railroads for the repairs made on cars of other railroads. On opening statement plaintiff's counsel (over objection) stated:

> "Our evidence will further show that much of the heavy plywood ends that were torn out of these cars were required to be torn out with inadequate tools, inadequate machinery and equipment, even though it did not have to be torn out. Our evidence will show that replacement material was not as good as the materials they tore out and they only tore it out for billing purposes, to bill other railroads to increase the billing for the Frisco."

Throughout the trial, on numerous occasions, the relationship between unnecessary removal and billings to other railroads was referred to. We are not dealing with an isolated piece of evidence, but rather with a recurring theme, which because of the initial erroneous ruling plaintiff continued to stress and defendant attempted to defend against. Here the objectionable evidence placed a false issue before the jury and we cannot conclude that it did not mislead the jurors. For the erroneous admission of this evidence the cause must be reversed and remanded for new trial.

We deal with defendant's remaining points as they are likely to arise again on retrial.

Defendant's second contention is that the trial court erred in admitting Dr. Thomas Banton's testimony concerning the man-

---

perform the work. The issue of contributory negligence was whether he performed it in a negligent manner. Whether the work was necessary does not reach this issue.

ner in which plaintiff's claimed injury occurred and the details of plaintiff's past complaints because Dr. Banton first saw plaintiff 15 months after the claimed injury and his testimony is inadmissible hearsay. Dr. Banton testified that he examined plaintiff at counsel's request more than one year after the injury. He stated over objection that the history obtained from plaintiff was that he was pulling heavy items from a boxcar when he experienced law back pain. In response to a hypothetical question Dr. Banton testified that, based on reasonable medical certainty, plaintiff's medical problems were caused by the injury received on October 23, 1974, in pulling end lining.

We need not decide whether Dr. Banton's challenged testimony is hearsay or not because admission of the evidence, even if inadmissible, could not result in reversible error. The admission of evidence claimed to be hearsay is reversible error only if the complaining party is prejudiced. McDowell v. Southwestern Bell Telephone Co., 546 S.W.2d 160 (Mo. App. 1976) [1]; *accord,* Fallert Tool & Engineering Co., Inc. v. McClain, 579 S.W.2d 751 (Mo. App. 1979) [14-16]. The complaining party cannot be prejudiced by the allegedly inadmissible evidence if that party offers evidence to the same effect as the challenged evidence, McDowell v. Southwestern Bell Telephone Co., *supra,* or if the challenged evidence is merely cumulative to other admitted evidence of like tenor. Fallert Tool & Engineering Co., Inc., *supra;* Baker v. Woodbury, 492 S.W.2d 157 (Mo. App. 1973) [2,4].

In the case before us, other independent evidence of the manner in which plaintiff sustained injury and plaintiff's past complaints had been introduced by both plaintiff and defendant. Plaintiff testified prior to Dr. Banton and stated that he was pulling with extreme force on the end lining when he felt low back pain that caused him to stop working. A co-worker, Gary Marshall, who was assisting plaintiff in pulling the end lining, testified for plaintiff that plaintiff had stopped working, held

his back, and told Marshall that he hurt his back. This evidence showed the circumstances surrounding the injury independent of Dr. Banton's testimony. Other physicians who testified for plaintiff stated plaintiff gave them the same history as related by Dr. Banton. In addition, defendant's witness Dr. Paul Stohr later testified to the identical facts, saying that plaintiff told the witness he injured his back pulling a large piece of plywood from the side of a boxcar.

Dr. Banton's testimony could not have prejudiced plaintiff, and we rule adversely to defendant upon its second contention.

Defendant next contends the trial court erred in refusing defendant's tendered Instruction A withdrawing from the jury any consideration of a "foot drop" condition which plaintiff might develop. Defendant argues the testimony of plaintiff's doctors showed only a possibility, and not a reasonable medical certainty, that the condition would occur and that the condition was not sufficiently related to plaintiff's case to constitute an element of damages. Dr. Thomas Banton testified that his first examination of plaintiff revealed plaintiff had a weakness of the right great toe, which indicated damage to the fifth lumbar nerve. Dr. James Brown stated there was a possibility that plaintiff might develop foot drop and that, if an examination of plaintiff showed atrophy of the right leg, it would be due to a L5 nerve injury. Dr. Banton testified to the discovery of atrophy in plaintiff's right quadriceps. Giving or refusing a withdrawal instruction is a matter directed to the discretion of the trial court, which discretion should be guided by the degree to which evidence has been introduced which might mislead the jury in its consideration of the case as it is pleaded. Sampson v. Missouri Pacific R. R. Co., 560 S.W.2d 573 (Mo. banc 1978) [9]. We cannot find the doctors' testimony so extensive or inflammatory as to mislead the jury. The aggregate of the doctors' testimony shows that plaintiff had exhibited symptoms of atrophy and weakness which would support the theory of a foot drop condi-

tion. Therefore, the court did not abuse its discretion in refusing Instruction A.

Defendant's fourth contention is that the trial court erred in refusing defendant's tendered non-MAI Instructions B, D, and E because such instructions comported with federal law pertaining to F.E.L.A. and federal law governs in such cases.

Instruction B states:

> "The term negligent or negligence as used in these instructions means that failure to use that degree of care than [sic] an ordinarily careful and prudent person would use under the same or similar circumstances.
>
> "The defendant is not an insurer of the safety of its employees while they are on duty. The defendant is not held to absolute responsibility for reasonably safe conditions, appliances, or methods or work; defendant's duty is to exercise ordinary care commensurate with the danger reasonably to be anticipated.
>
> "The happening of an injury to plaintiff, standing alone, does not make defendant liable and it does not raise a presumption of negligence on the part of defendant.
>
> "The duty of defendant is measured by what is reasonably foreseeable under the circumstances."

The first paragraph of Instruction B sets forth a definition of negligence which is approved by MAI 11.02 and which was given by the trial court below in Instruction 3. However, the second, third and fourth paragraphs of Instruction B are inconsistent with MAI and would be properly refused under MAI because the paragraphs are abstract statements of law requiring no finding by the jury, Anderson v. Sellers, 521 S.W.2d 33 (Mo. App. 1975) [2], and the paragraphs incorrectly instruct the jury upon what the issues are not, rather than upon what the issues

are. Wise v. Coleman, 360 Mo. 829, 230 S.W.2d 870 (Mo. 1950) [1,2].

Any modification of an approved MAI instruction must be simple and brief, Rule 70.01(e),[3] and shall not confuse and mislead the jury. Woodford v. Illinois Central Gulf R. R. Co., 518 S.W.2d 712 (Mo. App. 1974) [6,7]. Instruction B does not conform to such standard.

Instruction D reads:

> "Your verdict must be for defendant if you believe that the work plaintiff was performing was difficult but that defendant was not negligent.
>
> "Defendant was not required to furnish plaintiff with the latest, best, or most perfect appliances with which to work, nor to discard standard appliances and tools already in use provided those tools and appliances in use were safe and suitable. You may not find defendant liable merely because there may be a safer or easier method of performing the work in question."

Instruction D purports to converse the verdict director given in this case, Instruction 4, modeled upon MAI 24.01. Instruction D, however, is not in substantially the same language as that used in Instruction 4 and was, therefore, properly refused under MAI. Griffith v. St. Louis-San Francisco Ry. Co., 559 S.W.2d 278 (Mo. App. 1977) [2], *cert. denied,* 436 U.S. 926 (1978).

Instruction E states:

> "If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take

---

[3] Rule 70.01(e), in force at the time of this trial, has been renumbered and is currently Rule 70.02(e).

> into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must therefore determine the present value or present worth of the money which you award for such future loss."

Instruction 7, a damages instruction authorized by MAI 4.01, was given in this case. Any further explanation of the MAI damage instruction by the tendered Instruction E is not acceptable procedure under MAI. McBee v. Schlupbach, 529 S.W.2d 435 (Mo. App. 1975) [2]; *accord,* Jurgeson v. Romine, 442 S.W.2d 176 (Mo. App. 1969) [1-3].

Thus, defendant's proffered Instructions B, D, and E were properly refused under MAI. Further, we do not believe the circumstances or the guidelines set forth in Rogers v. Thompson, 308 S.W.2d 688, (Mo. 1958) [2], would indicate the trial court's action interfered with federal rights. We can see no compelling reason to limit application of the general rule that the form of instructions and manner in which the substantive law is submitted to the jury in an F.E.L.A. case are procedural matters governed by state law. Rogers v. Thompson, *supra;* 79 A.L.R.2d 553, 572-73 (1961).

Defendant's fifth contention is that the trial court erred in refusing defendant's proffered Instruction C, which reads:

> "If your verdict is in favor of plaintiffs, your award will not be subject to any income taxes and you should not consider such taxes in fixing the amount of your award."

Such an instruction is improper under MAI, Senter v. Ferguson, 486 S.W.2d 644 (Mo. App. 1972) [1], and the trial court properly refused it.

Defendant's sixth argument on appeal is that the trial court erred in prohibiting defendant's argument to the jury that any

award for loss of future earnings should be reduced to present value and would not be diminished by any income tax.

Instructions upon the law of the case are the prerogative of the court, not of counsel. Counsel's argument is improper insofar as it undertakes to instruct the jury upon the law in addition to instructions given by the court. Doyle v. St. Louis-San Francisco Ry. Co., 571 S.W.2d 717, (Mo. App. 1978) [15]. Arguments concerning future disposition of any jury award in a negligence action are improper. *See,* Price v. Bangert Bros. Road Builders, Inc., 490 S.W.2d 53 (Mo. 1973) [6] (trial court properly refused counsel's argument that any award over $1,500 to an infant plaintiff would be held by the probate court until her majority). Further, the arguments proposed by defendant are devoid of evidentiary support upon the record before us and are, thus, improper. *See,* McCormick v. Smith, 459 S.W.2d 272 (Mo. 1970) [3] (mathematical formula for pain and suffering perforce improper).

We cannot say the trial court abused its broad discretion to permit or limit argument of counsel. Norfolk & W. Ry. Co. v. Greening, 458 S.W.2d 268 (Mo. 1970) [7-9]; Doyle v. St. Louis-San Francisco Ry. Co., *supra* at [12-14].

Defendant's seventh contention is that the trial court erred in giving Instruction 4, the verdict director modeled upon MAI 24.01. Defendant argues the instruction was a roving commission to the jury and submitted an issue that was not tried. We are bound by the Supreme Court rules and decisions which make the use of MAI 24.01 mandatory to the exclusion of other instructions. Griffith v. St. Louis-San Francisco Ry. Co., *supra* at [1]. Instruction 4 was properly given.

Defendant's final contention is that the trial court erred in denying its motion for new trial because the verdict was excessive and resulted from the passion and prejudice of the jury. Because of our disposition of the case it is unnecessary for us to reach this issue.

Judgment is reversed and cause is remanded for new trial.

GERALD M. SMITH, JUDGE

DISSENTING OPINION

I respectfully dissent from the majority opinion insofar as it holds the trial court's admission of evidence that defendant would often needlessly replace good quality boxcar lining with poor quality lining at the time of plaintiff's accident constituted reversible error.

I initially disagree with the majority's conclusion that all aspects of the appellant's claims of prejudice allegedly arising from admission of the challenged evidence were preserved by defendant's objection to the evidence in the trial court. Defendant's trial objection did not bring to the trial court's attention the potential prejudice now noted upon appeal, that the challenged evidence made defendant appear dishonest. An objection to the admission of evidence must be timely and specific, containing the proper ground of exclusion, otherwise the trial court cannot be convicted of reversible error upon appeal for overruling the objection. *Nagel* v. *Bi-State Dev. Agency,* 567 S.W.2d 644, 646[1] (Mo. banc 1978); *In re King's Estate,* 572 S.W.2d 200, 204[3] (Mo.App. 1978); *Bly* v. *Skaggs Drug Centers, Inc.,* 562 S.W.2d 723, 726[5] (Mo.App. 1978). An objection at trial that evidence is not relevant to the issues, without specification of any particular prejudicial effect of the evidence, preserves only the question of the natural prejudicial effect of immaterial and irrelevant evidence, that is, whether the evidence could prejudice the appellant by distracting the jury from the true issues or misleading the jury. *Luechtefeld* v. *Margulous,* 151 S.W.2d 710, 713 [1-4] (Mo.App. 1941). I do not agree defendant's complaint that the challenged evidence makes defendant appear dishonest is before us upon this appeal.

I also disagree with the majority's conclusion the challenged evidence was irrelevant to the issues and therefore improperly admitted. As noted by the majority, evidence is relevant if the fact it tends to establish in turn tends to prove or disprove a fact in issue or to corroborate evidence which is relevant and which bears upon the principal issue. *Charles F. Curry & Co.* v. *Hedrick*, 378 S.W.2d 522, 536[18] (Mo. 1964). The principal issue in the instant case is the potential liability under F.E.L.A. which turns upon defendant's negligence. *Stone* v. *New York, C., & St. L. Ry. Co.*, 344 U.S. 407 (1953). "The question is what a reasonable and prudent person would have done under the circumstances." Stone v. New York, C., & St. L. Ry. Co., *supra*. The unreasonable risk of harm which is the watchword of negligence may be composed of ". . . a number of different hazards, which frequently are of a more or less definite character. The actor's negligence lies in subjecting the other to the aggregate of such hazards." Restatement (Second) of Torts, §281, Comment 1. (1965).

In the instant case, the challenged evidence tends to prove the hazardous, physically taxing job which resulted in plaintiff's injury may not have been required by the condition of the boxcar lining.[1] Such evidence would, logically, tend to increase the potential risk of harm to plaintiff by increasing the number of times plaintiff was exposed to a risk of harm while engaged in the task. Although clearly not, in itself, submissible evidence of negligence, the defendant's conduct as reflected by the challenged evidence could be construed as one element in the aggregate of hazards plaintiff alleged as defendant's failure to provide reasonably safe working conditions and methods of work. I do not believe the trial court abused its broad discretion in finding the evidence relevant. *State ex rel. State Highway Com'n* v. *Drisko*, 537 S.W.2d 645, 649[9] (Mo.App. 1976).

---

[1] Although the majority noted the evidence does not establish that the end lining in the boxcar in which plaintiff was injured was being unnecessarily removed, the conclusion that the evidence does not

Here the defendant had knowledge of the problems and hazards involved in the removal of the lining. It also had knowledge that the removal of the lining with the use of a lining bar was inadequate and unsafe and had caused injury to the plaintiff before. It was also established that it was not necessary to remove the lining at all, but there was a method whereby the existing lining could be covered with the new lining. Considering the allegation of negligence asserted by plaintiff[3] and the definition of negligence[4] submitted by instruction No. 3, I believe the challenged deposition testimony goes to the reasonableness of defendant's conduct under the circumstances, and it was within the sound discretion of the trial court to admit it.

---

establish the lining was being removed for good cause is equally true. Plaintiff testified he did not observe any defects in the lining of the boxcar in which he was injured.

[3] The allegation asserted by plaintiff is as follows:

"(a) Defendant failed to provide reasonably safe working conditions when defendant knew or in the exercise of ordinary care should have known that said failure would reasonably likely cause substantial harm.

"(b) Defendant failed to provide reasonably safe methods of work when defendant knew or in the exercise of orindary care should have known that said failure would reasonably likely cause substantial harm.

"(c) Defendant failed to provide reasonably safe equipment and work tools when defendant knew or in the exercise of ordinary care should have known that said failure would reasonably likely cause substantial harm.

"(d) Defendant failed to provide adequate help when defendant knew or in the exercise of ordinary care should have known that said failure would reasonably likely cause substantial harm."

[4] "INSTRUCTION NO. 3

The term 'negligence' as used in these instructions means the failure to use that degree of care that an ordinary and prudent person would use under the same or similar circumstances."

However, assuming the majority is correct in its conclusion that the evidence is immaterial or irrelevant, I certainly cannot conclude admission of the evidence was prejudicial to defendant so as to constitute reversible error. *Sanders* v. *H. & S. Motor Freight, Inc.*, 526 S.W.2d 332, 335[2] (Mo.App. 1975).

Certainly, the context of the challenged evidence would diminish any prejudicial effect of the evidence. The same witness who gave the challenged evidence also testified as follows:

> "Q. Going back to another matter for just a minute. Was the lining any harder to pull, that didn't need to be pulled, in your opinion, as that did need to be pulled?
>
> * * * * *
>
> "A. Yes."

The majority's decision notes the challenged testimony was not an isolated incident but a recurring theme throughout the trial. Plaintiff's counsel was permitted to argue, over objection, in opening argument that the evidence would show that upon numerous occasions it was not necessary to remove boxcar lining. However, upon objection, plaintiff's other references to the needlessness of the work were excluded. Further evidence upon the subject came in without objection as testimony (cross-examination) by a defense witness. No reference was made to the needlessness of pulling boxcar lining in plaintiff's closing argument.

If the jury is properly instructed upon the law and the jury's verdict is within the properly admmitted evidence, it is difficult to hold an erroneous admission of irrelevant evidence prejudicial. *Mills* v. *Keith Marsh Chevrolet, Inc.*, 549 S.W.2d 604, 608-609[9] (Mo.App. 1977). In the instant case, the jury was correctly instructed upon the issue of defendant's negligence, and the verdict finding negligence is within the evidence, not including the evidence challenged upon appeal.

Having read the voluminous transcript, I cannot find the quantum or nature of the challenged evidence was so collateral to the issues to have distracted or misled the jury from the true issues in the case.

I would affirm the judgment of the trial court.

Robert G. Dowd, Presiding Judge

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
EN BANC

No. 40164

Ronald E. Dunn,
Respondent,

v.

St. Louis San Francisco Railway Company,
a Corporation,
Appellant.

Appeal from the Circuit Court City of St. Louis

Hon. William A. Geary, Jr., Judge

Opinion Filed: August 12, 1980

This is an action for damages under the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C.A. 51 *et. seq.* Defendant appeals from a judgment entered for plaintiff as a result of a jury verdict for $275,000. Plaintiff sustained injuries while performing his job as an apprentice carman for defendant, St. Louis-San Francisco Railway Company. Our original divisional decision reversed and remanded for new trial. Rehearing before an expanded panel was granted and we arrive at the same conclusion as did the division.[1]

---

[1] The majority opinion in division was adopted largely from an opinion prepared by Dowd, P.J. which failed of acceptance. So also is much of this opinion.

Plaintiff was employed by defendant in Fort Smith, Arkansas as an apprentice carman and had completed one and one-half years of a four year apprenticeship. A carman rebuilds and repairs boxcars, tankcars, and flatcars. In the course of his job, a carman repairs wheels, gears, brakes and removes the wooden lining from the interiors of boxcars.

Boxcar lining is built of tongue and groove boards or of plywood sheets and is nailed to stringers in the ends of the boxcars. A stringer is a four by four oak wooden board. Its length is equal to the width of a boxcar. Stringers are bolted horizontally to the steel interiors of the boxcars. Each railroad company lines its cars with slightly different materials.

The wooden boxcar lining is removed, or "pulled", on K-1 track at defendant's facility in Fort Smith. As cars from various railroads enter the train yard, an inspector routes them to designated tracks for appropriate repairs.[2] The lead carman then marks lining to be pulled from the cars assigned to K-1 track.

At the time of plaintiff's injury a carman was given two tools to pull the lining, a crowbar and a five to six foot long lining bar, weighing twenty-five pounds and having a foot at one end. These tools performed adequately to pinch, pry or pull, except when the lining of cars for the Atchison, Topeka & Santa Fe Railroad needed removal. The lining of the Santa Fe cars was built of two plywood sheets one inch thick, four feet wide and ten feet long, with thirteen inch strips between, and was attached with 200-300 heavy screwnails.[3] Often, two men working

---

[2] Frisco billed the other railroads for these repairs.

[3] The number and type of nails was sharply disputed. Our factual statements are essentially based upon the evidence most favorable to plaintiff, and in some cases is disputed. We do not view the factual disparities as important to the issues presented on appeal.

together could not remove the lining from Santa Fe cars. Lining bars had been bent in the removal process. The employees had complained for years about the problems and hazards of removing this type of lining. The carmen complained at their periodic safety meetings of the inadequacy of the tools furnished, but no other tools were provided by Frisco for Santa Fe cars. There was evidence pro and con on whether there were any other types of tools which could be utilized to do the job better or more easily. In fact the plaintiff had been previously injured in removing the same type of lining with the tools provided. The lining was very hard to impossible to remove. The employees had to "strain their guts" to pull this lining off, using their back, legs and arms. Sometimes the carmen would ask a laborer to run the forklift to assist in the pulling of lining.[4] A clamp and chain were attached to the plywood lining, and the power of the hydraulic system of the forklift pulled it. However, the forklift was not always available, and the carmen's supervisors considered the use of a forklift for this purpose dangerous.

It was also established that it is not always necessary to remove this type lining at all. There was a method whereby the existing lining could be covered with new lining, but sometimes the lining must be removed in order to make other repairs.

On the date of his injury, Wednesday, October 23, 1974, plaintiff had removed the lining from four boxcars before he and journeyman carman Gary Marshall began work on a Santa Fe car. When he realized it was the heavy lining, plaintiff asked his supervisor, lead carman Leo Moss, for a forklift. However, Moss told him to use the lining bar. Plaintiff inserted his lining bar three feet from the floor, placed one foot on the floor and the other foot on the end wall, in a crouched position, and pulled. He then felt a sharp, shooting pain in his lower back. He tried to stand up, but was unable to rise to a straight, upright position.

---

[4] By union contract, only a laborer could operate the forklift.

He told Gary he was hurt, rested ten minutes, then returned to pulling the lining. Thinking the pain would eventually abate, he worked Thursday and Friday on a different assignment, checking and adjusting air brakes on the cars. Plaintiff did not report the injury to his supervisors or seek medical assistance on the job because he feared reprisal for reporting an on-the-job injury. There was evidence that it was known to other employees, including supervisors that he had been injured. After bedrest during the weekend, plaintiff reported for work on Monday. He could not work due to pain, was hospitalized, and eventually a ruptured disc was removed surgically.

Defendant's first contention upon appeal is that the trial court erred in admitting certain deposition testimony given during defendant's recross examination of one of defendant's employees whose job had included pulling the lining from boxcars. The challenged testimony consists of the employee's opinion that defendant often needlessly replaced good quality lining with poor quality lining at the time of plaintiff's accident. Upon appeal, defendant contends the challenged evidence was not material or relevant to the issue of defendant's negligence and prejudiced defendant by making defendant appear dishonest.

Plaintiff contends initially that the matter has not been preserved. The objection at trial was lengthy but can be summarized as a contention of irrelevance because the evidence was beyond the scope of the pleadings. The same objection was carried forward into the motion for new trial. On appeal defendant again contends the evidence was irrelevant to the pleaded issues and further asserts that this caused "the defendant to be placed in a bad light, in short, to appear crooked, in the eyes of the jury on a false issue which was neither pleaded nor relevant to the case." This is not a change of theory as contended by plaintiff. Throughout defendant has asserted that the evidence was not relevant to the pleaded issues. On appeal defendant has asserted the same contention and added to it a reason why the admission of the evidence was prejudicial. This is proper. At

trial an objection need only bring to the court's attention the legal ground upon which the objection is based. If the legal ground is correct the evidence should be excluded. On appeal the court must decide not only whether the evidence should have been excluded, but also whether the failure to so exclude it was prejudicial. It is not a change of theory to set forth in the "points relied on" not only the legal ground for the objection but the prejudice which arose from the error of admitting it. Luechtefeld v. Marglous, 151 S.W.2d 710 (Mo. App. 1941) [1-4]. That is what defendant has done here. In addition, the issue of relevance was preserved and the test of irrelevance is whether it misleads the jury into consideration of a false issue. Luechtefeld v. Marglous, *supra*. If the jury was so misled we need not determine the precise manner in which defendant was prejudiced.

Plaintiff originally offered into evidence the redirect examination on deposition of defendant's employee. The court sustained an objection to this evidence. Plaintiff then offered the re-cross examination covering the same subject matter. The court overruled an objection to this evidence, possibly on the ground that such testimony had been elicited by defendant at the deposition. In Kane v. Metropolitan Life Ins. Co., 73 S.W.2d 826 (Mo. App. 1934) [6,7], it was recognized that cross-examination on deposition may cover all subjects encompassed by the direct examination, even though the testimony on direct was objectionable, without constituting a waiver to the objectionable testimony. This is because depositions are taken without judicial supervision and a litigant must protect himself against the possibility that evidence which he considers objectionable may not be so viewed by a judge during the trial. This is apparent from our Rules covering depositions. *See* Rules 57.03(d) and 57.07(c) and (d). The evidence complained of did not become admissible (if otherwise objectionable) because it was elicited by defendant on cross-examination at deposition.

Plaintiff alleged negligence by defendant in four specific areas: (1) failure to provide safe working conditions, (2) failure to provide safe methods of work, (3) failure to provide safe equipment and work tools, and (4) failure to provide adequate help. The testimony complained of was that defendant had on occasions removed end lining which was good and sometimes had replaced it with bad end lining. Plaintiff testified that the lining in the car he was working on at the time of his injury looked good. There was evidence, uncontradicted, that it was necessary on occasion to take out good lining in order to make other repairs on the cars.

We are unable to find any relevance between the four asserted grounds of negligence and the testimony objected to. Evidence is relevant if the fact it tends to establish in turn tends to prove or disprove a fact in issue, or to corroborate evidence which is relevant and which bears upon the principal issue. Charles F. Curry & Co. v. Hedrick, 378 S.W.2d 522 (Mo. 1964) [18,19]. Whether or not the railroad on occasion unnecessarily removed end lining does not fall under any of the pleaded charges of negligence, either directly or inferentially. The evidence pertained to a management decision about whether the work should be done at all, not the method or way in which it was to be done. We need not decide whether F.E.L.A. applies to possible negligence in management decisions about what work needs to be done, if such negligence was pleaded. Here it has not been pleaded. There is further no correlation between the claimed company policy and plaintiff's injury. The evidence did not establish that the end lining in the car in which plaintiff was injured was being unnecessarily removed. The evidence of the plaintiff affirmatively established that the employees were allowed whatever time was needed to complete the particular job—the number of cars to be worked on did not determine the working conditions, methods, tools or help involved. There was no attempt to show that the danger of injury was increased because end lining was unnecessarily removed from some cars.

On rehearing plaintiff has briefed extensively a contention that the evidence was relevant to establish that an alternative method of doing the work was available. No suggestion that such was the purpose of the evidence was made at the trial during lengthy colloquies at the bench concerning defendant's objections. Nor was any evidence adduced that an alternative method was available for this particular car, and there was substantial evidence that an alternative method of nailing new boards over the old boards could not be used in some situations because of necessary repair work behind the boards.[5] Plaintiff's assertion that the absence of evidence that that type of repair was required supports his alternative method theory is really an assertion that defendant had the burden of proof to disprove the theory. It was plaintiff's burden to establish that the alternative method was available for the car involved and this he did not do. Nor can plaintiff successfully contend that defendant failed to preserve the matter by not seeking to strike the testimony at the conclusion of plaintiff's case when plaintiff failed to adduce the evidence necessary to support the alternative method theory. Neither defendant nor the trial court was advised that the evidence was offered for that purpose, and the trial court's ruling was not premised upon such a theory of recovery. Defendant was not required to seek to strike the evidence on the basis that plaintiff failed to establish a theory which plaintiff never asserted at the trial level. The evidence was not relevant to the pleaded issues and objection thereto should have been sustained.[6]

---

[5] There was also uncontradicted evidence that the alternative method plaintiff suggests could not be utilized for cars from railroads other than the road doing the repair work.

[6] Plaintiff also contends the evidence was relevant to the question of contributory negligence pleaded by defendant. We are unable to understand how. There was no dispute that plaintiff was directed to perform the work. The issue of contributory negligence was whether he performed it in a negligent manner. Whether the work was necessary does not reach this issue.

We turn to the question of prejudice. Irrelevant evidence is objectionable because it tends to draw the minds of the jury away from the point at issue and misleads it into consideration of a false issue. Luechtefeld v. Marglous, *supra*. In this case the objected to testimony was linked with evidence that the defendant billed other railroads for the repairs made on cars of other railroads. On opening statement plaintiff's counsel (over objection) stated:

> "Our evidence will further show that much of the heavy plywood ends that were torn out of these cars were required to be torn out with inadequate tools, inadequate machinery and equipment, even though it did not have to be torn out. Our evidence will show that replacement material was not as good as the materials they tore out and they only tore it out for billing purposes, to bill other railroads to increase the billing for the Frisco."

Throughout the trial, on numerous occasions, the relationship between unnecessary removal and billings to other railroads was referred to. We are not dealing with an isolated piece of evidence, but rather with a recurring theme, which because of the initial erroneous ruling plaintiff continued to stress and defendant attempted to defend against. It became an issue at trial whether defendant did on occasion require unnecessary removal of end lining in order to increase billings, an issue unrelated to plaintiff's pleaded allegations of negligence. The objectionable evidence placed this false issue before the jury and we cannot conclude that it did not mislead the jurors. For the erroneous admission of this evidence the cause must be reversed and remanded for new trial.

We deal with defendant's remaining points as they are likely to arise again on retrial.

Defendant's second contention is that the trial court erred in admitting Dr. Thomas Banton's testimony concerning the manner in which plaintiff's claimed injury occurred and the details

of plaintiff's past complaints because Dr. Banton first saw plaintiff 15 months after the claimed injury and his testimony is inadmissible hearsay. Dr. Banton testified that he examined plaintiff at counsel's request more than one year after the injury. He stated over objection that the history obtained from plaintiff was that he was pulling heavy items from a boxcar when he experienced low back pain. In response to a hypothetical question Dr. Banton testified that, based on reasonable medical certainty, plaintiff's medical problems were caused by the injury received on October 23, 1974, in pulling end lining.

We need not decide whether Dr. Banton's challenged testimony is hearsay or not because admission of the evidence, even if inadmissible, could not result in reversible error. The admission of evidence claimed to be hearsay is reversible error only if the complaining party is prejudiced. McDowell v. Southwestern Bell Telephone Co., 546 S.W.2d 160 (Mo. App. 1976) [1]; *accord,* Fallert Tool & Engineering Co., Inc. v. McClain, 579 S.W.2d 751 (Mo. App. 1979) [14-16]. The complaining party cannot be prejudiced by the allegedly inadmissible evidence if that party offers evidence to the same effect as the challenged evidence, McDowell v. Southwestern Bell Telephone Co., *supra,* or if the challenged evidence is merely cumulative to other admitted evidence of like tenor. Fallert Tool & Engineering Co., Inc., *supra;* Baker v. Woodbury, 492 S.W.2d 157 (Mo. App. 1973) [2-4].

In the case before us, other independent evidence of the manner in which plaintiff sustained injury and plaintiff's past complaints had been introduced by both plaintiff and defendant. Plaintiff testified prior to Dr. Banton and stated that he was pulling with extreme force on the end lining when he felt low back pain that caused him to stop working. A co-worker, Gary Marshall, who was assisting plaintiff in pulling the end lining, testified for plaintiff that plaintiff had stopped working, held his back, and told Marshall that he hurt his back. This evidence

showed the circumstances surrounding the injury independent of Dr. Banton's testimony. Other physicians who testified for plaintiff stated plaintiff gave them the same history as related by Dr. Banton. In addition, defendant's witness Dr. Paul Stohr later testified to the identical facts, saying that plaintiff told the witness he injured his back pulling a large piece of plywood from the side of a boxcar.

Dr. Banton's testimony could not have prejudiced defendant, and we rule adversely to defendant upon its second contention.

Defendant next contends the trial court erred in refusing defendant's tendered Instruction A withdrawing from the jury any consideration of a "foot drop" condition which plaintiff might develop. Defendant argues the testimony of plaintiff's doctors showed only a possibility, and not a reasonable medical certainty, that the condition would occur and that the condition was not sufficiently related to plaintiff's case to constitute an element of damages. Dr. Thomas Banton testified that his first examination of plaintiff revealed plaintiff had a weakness of the right great toe, which indicated damage to the fifth lumbar nerve. Dr. James Brown stated there was a possibility that plaintiff might develop foot drop and that, if an examination of plaintiff showed atrophy of the right leg, it would be due to a L5 nerve injury. Dr. Banton testified to the discovery of atrophy in plaintiff's right quadriceps. Giving or refusing a withdrawal instruction is a matter directed to the discretion of the trial court, which discretion should be guided by the degree to which evidence has been introduced which might mislead the jury in its consideration of the case as it is pleaded. Sampson v. Missouri Pacific R. R. Co., 560 S.W.2d 573 (Mo. banc 1978) [9]. We cannot find the doctor's testimony so extensive or inflammatory as to mislead the jury. The aggregate of the doctors' testimony shows that plaintiff had exhibited symptoms of atrophy and weakness which would support the theory of a foot drop condition. Therefore, the court did not abuse its discretion in refusing Instruction A.

Defendant's fourth contention is that the trial court erred in refusing defendant's tendered non-MAI Instructions B,D, and E because such instructions comported with federal law pertaining to F.E.L.A. and federal law governs in such cases.

Instruction B. states:

> "The term negligent or negligence as used in these instructions means that failure to use that degree of care than [sic] an ordinarily careful and prudent person would use under the same or similar circumstances.
>
> "The defendant is not an insurer of the safety of its employees while they are on duty. The defendant is not held to absolute responsibility for reasonably safe conditions, appliances, or methods or work; defendant's duty is to exercise ordinary care commensurate with the danger reasonably to be anticipated.
>
> "The happening of an injury to plaintiff, standing alone, does not make defendant liable and it does not raise a presumption of negligence on the part of defendant.
>
> "The duty of defendant is measured by what is reasonably foreseeable under the circumstances."

The first paragraph of Instruction B sets forth a definition of negligence which is approved by MAI 11.02 and which was given by the trial court below in Instruction 3. However, the second, third and fourth paragraphs of Instruction B are inconsistent with MAI and would be properly refused under MAI because the paragraphs are abstract statements of law requiring no finding by the jury, Anderson v. Sellers, 521 S.W.2d 33 (Mo. App. 1975) [2], and the paragraphs incorrectly instruct the jury upon what the issues are not, rather than upon what the issues are. Wise v. Coleman, 360 Mo. 829, 230 S.W.2d 870 (Mo. 1950) [1,2].

Any modification of an approved MAI instruction must be simple and brief, Rule 70.01(e),[7] and shall not confuse and mislead the jury. Woodford v. Illinois Central Gulf R. R. Co., 518 S.W.2d 712 (Mo. App. 1974) [6,7]. Instruction B does not conform to such standard.

Instruction D reads:

> "Your verdict must be for defendant if you believe that the work plaintiff was performing was difficult but that defendant was not negligent.
>
> "Defendant was not required to furnish plaintiff with the latest, best, or most perfect appliances with which to work, nor to discard standard appliances and tools already in use provided those tools and appliances in use were safe and suitable. You may not find defendant liable merely because there may be a safer or easier method of performing the work in question."

Instruction D. purports to converse the verdict director given in this case, Instruction 4, modeled upon MAI 24.01. Instruction D, however, is not in substantially the same language as that used in Instruction 4 and was, therefore, properly refused under MAI. Griffith v. St. Louis-San Francisco Ry. Co., 559 S.W.2d 278 (Mo. App. 1977) [2], *cert. denied,* 436 U.S. 926 (1978).

Instruction E States:

> "It you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have

---

[7] Rule 70.01(e), in force at the time of this trial, has been renumbered and is currently Rule 70.02(e).

> the use of this money in a lump sum. You must therefore determine the present value or present worth of the money which you award for such future loss."

Instruction 7, a damages instruction authorized by MAI 4.01, was given in this case. Any further explanation of the MAI damage instruction by the tendered Instruction E is not acceptable procedure under MAI. McBee v. Schlupbach, 529 S.W.2d 435 (Mo. App. 1975) [2]; *accord,* Jurgeson v. Romine, 442 S.W.2d 176 (Mo. App. 1969) [1-3].

Thus, defendant's proffered Instructions B, D, and E were properly refused under MAI. Further, we do not believe the circumstances or the guidelines set forth in Rogers v. Thompson, 308 S.W.2d 688, (Mo. 1958) [2], would indicate the trial court's action interfered with federal rights. We can see no compelling reason to limit application of the general rule that the form of instructions and manner in which the substantive law is submitted to the jury in an F.E.L.A. case are procedural matters governed by state law. Rogers v. Thompson, *supra;* 79 A.L.R.2d 553, 572-73 (1961).

Defendant's fifth contention is that the trial court erred in refusing defendant's proffered Instruction C, which reads:

> "If your verdict is in favor of plaintiffs, your award will not be subject to any income taxes and you should not consider such taxes in fixing the amount of your award."

Since the trial of this case, and after the divisional opinion was handed down by this court, the United States Supreme Court decided Norfolk & Western Railway Company v. Liepelt, ___ U.S. ___, 100 S.Ct. 755, 62 L.Ed2d 698 (1980). It was there held that a defendant in an F.E.L.A. case was entitled, as a matter of federal law, to an instruction substantially identical to that tendered by defendant here. This is true whether the case is tried in state or federal court. Upon rehearing we requested the parties to brief the question of whether the *Liepelt* decision

was prospective or retrospective in application—does it apply to cases tried prior to the decision but still on appeal or otherwise not final at the time of the decision. In view of our disposition of this case it is unnecessary for us to reach that question. On retrial the trial court will have the benefit of the *Liepelt* decision to guide it.

Defendant's sixth argument on appeal is that the trial court erred in prohibiting defendant's argument to the jury that any award for loss of future earnings should be reduced to present value and would not be diminished by any income tax.

Instructions upon the law of the case are the prerogative of the court, not of counsel. Counsel's argument is improper insofar as it undertakes to instruct the jury upon the law in addition to instructions given by the court. Doyle v. St. Louis-San Francisco Ry Co., 571 S.W.2d 717, (Mo. App. 1978) [15]. Arguments concerning future disposition of any jury award in a negligence action are improper. *See,* Price v. Bangert Bros. Road Builders, Inc., 490 S.W.2d 53 (Mo. 1973) [6] (trial court properly refused counsel's argument that any award over $1,500 to an infant plaintiff would be held by the probate court until her majority). Further, the arguments proposed by defendant are devoid of evidentiary support upon the record before us and are, thus, improper. *See,* McCormick v. Smith, 459 S.W.2d 272 (Mo. 1970) [3] (mathematical formula for pain and suffering perforce improper). To the extent that *Liepelt supra,* requires an instruction on the non-taxability of the award of damages, counsel may, of course, call to the attention of the jury the content of the court's instruction on the subject.

We cannot say the trial court abused its broad discretion to permit or limit argument of counsel. Norfolk v. W. Ry. Co. v. Greening, 458 S.W.2d 268 (Mo. 1970) [7-9]; Doyle v. St. Louis-San Francisco Ry. Co., *supra,* at [12-14].

Defendant's seventh contention is that the trial court erred in giving Instruction 4, the verdict director modeled upon MAI

24.01. Defendant argues the instruction was a roving commission to the jury and submitted an issue that was not tried. We are bound by the Supreme Court rules and decisions which make the use of MAI 24.01 mandatory to the exclusion of other instructions. Griffith v. St. Louis-San Francisco Ry. Co., *supra,* at [1]. Instruction 4 was properly given.

Defendant's final contention is that the trial court erred in denying its motion for new trial because the verdict was excessive and resulted from the passion and prejudice of the jury. Because of our disposition of the case it is unnecessary for us to reach this issue.

Judgment is reversed and cause is remanded for new trial.

Gerald M. Smith, Judge

DISSENTING OPINION

I respectfully dissent from the majority opinion insofar as it holds the trial court's admission of evidence that defendant would often needlessly replace good quality boxcar lining with poor quality lining at the time of plaintiff's accident constituted reversible error.

I initially disagree with the majority's conclusion that all aspects of the appellant's claims of prejudice allegedly arising from admission of the challenged evidence were preserved by defendant's objection in the trial court that the challenged evidence was irrelevant because beyond the scope of the pleadings. Defendant's trial objection did not bring to the trial court's attention the potential prejudice now asserted for the first time on appeal, that the challenged evidence made defendant appear dishonest. An objection to the admission of

evidence must be timely and specific, containing the proper ground of exclusion, otherwise the trial court cannot be convicted of reversible error upon appeal for overruling the objection. *Nagel* v. *Bi-State Dev. Agency,* 567 S.W.2d 644,646[1] (Mo. banc 1978); *In re King's Estate,* 572 S.W.2d 200, 204[3] (Mo.App. 1978); *Bly* v. *Skaggs Drug Centers, Inc.,* 562 S.W.2d 723, 726[5] (Mo.App. 1978). An objection at trial that evidence is not relevant to the issues, without specification of any particular prejudicial effect of the evidence, preserves only the question of the natural prejudicial effect of immaterial and irrelevant evidence, that is, whether the evidence could prejudice the appellant by distracting the jury from the true issues or misleading the jury. *Luechtefeld* v. *Margulous,* 151 S.W.2d 710, 713[1-4] (Mo.App. 1941); *followed in, Lawson* v. *Cooper,* 475 S.W.2d 442, 445-46[1-4] (Mo.App. 1972). I do not agree defendant's complaint that the challenged evidence makes defendant appear dishonest is before us upon this appeal. Insofar as the majority hold defendant's trial objection or irrelevancy preserves the question whether the evidence made defendant appear dishonest in addition to the question whether the evidence would distract or mislead the jury from the true issues, I believe the holding inconsistent with Luechtefeld v. Margulous, *supra,* and Lawson v. Cooper, *supra.*

I also disagree with the majority's conclusion the challenged evidence was irrelevant to the issues and therefore improperly admitted. As noted by the majority, evidence is relevant if the fact it tends to establish in turn tends to prove or disprove a fact in issue or to corroborate evidence which is relevant and which bears upon the principal issue. *Charles F. Curry & Co.* v. *Hedrick,* 378 S.W.2d 522, 536[18] (Mo. 1964).

The principal issue in the instant case is the potential liability under F.E.L.A. which turns upon defendant's negligence. *Stone* v. *New York, C., & St. L. Ry.,* 344 U.S. 407 (1953). "The question is what a reasonable and prudent person would have done under the circumstances." Stone v. New York, C., & St.

L. Ry., *supra*. The unreasonable risk of harm which is the watchword of negligence may be composed of ". . . a number of different hazards, which frequently are of a more or less definite character. The actor's negligence lies in subjecting the other to the aggregate of such hazards." Restatement (Second) of Torts, § 281, Comment 1, (1965).

In the instant case, the challenged evidence tends to prove the hazardous, physically taxing job which resulted in plaintiff's injury may not have been required by the condition of the boxcar lining. The majority hold such evidence irrelevant upon the basis the evidence does not establish that the end lining in the boxcar in which plaintiff was injured was being unnecessarily removed. I disagree with the majority's interpretation of the evidence in this respect. I believe the plaintiff's evidence clearly established that the lining was being unnecessarily removed and would so support a jury finding. Plaintiff, who was familiar with the process by which boxcars were screened to determine whether lining should be removed, testified he saw no reason why the lining in the boxcar in which he was injured needed to be removed. He testified he looked at the ends of the lining and saw nothing wrong with them. He saw no cracks or damage of any kind in the lining. The majority points to evidence that boxcar lining would sometimes be removed to make repairs other than replacement of defective boxcar lining when safety appliances had to be repaired or when contaminants had gotten behind the boxcar lining. However, the record is completely devoid of any evidence that the lining in question was required to be removed for any reason. Plaintiff's evidence was abundant to establish that the lining involved was being unnecessarily removed and the jury could have reasonably so found.

Evidence tending to establish the hazardous task which resulted in plaintiff's injury may not have been required would, logically, tend to increase the potential risk of harm to plaintiff by increasing the number of times plaintiff was exposed to a risk of harm while engaged in the task. Plaintiff would be perform-

ing the hazardous task[1] more often than if the task were performed only when necessary. Although evidence of removing lining unnecessarily would not in itself make a submissible case of negligence, the defendant's conduct suggested by the challenged evidence could be construed as one element in the aggregate of hazards plaintiff alleged as defendant's failure to provide reasonably safe working conditions, methods of work and adequate tools and which would constitute a submissible case of negligence. I do not believe the trial court abused its broad discretion in finding the evidence relevant. *State ex rel. State Highway Comn.* v. *Drisko,* 537 S.W.2d 645, 649[9] (Mo.App. 1976).

Here the defendant had knowledge of the problems and hazards involved in the removal of the boxcar lining. It also had knowledge that the removal of the lining with the use of a lining bar was inadequate and unsafe and had caused injury to the plaintiff before. It was also established that it was not necessary to remove the lining at all.[2] An alternative method whereby the existing lining could be covered with the new lining existed.

In F.E.L.A. actions, an employer is liable for his negligence if his negligence plays any part, even the slightest, in producing

---

[1] This is especially true when working on the Sante Fe boxcars where the end linings consisted of two plywood sheets, one inch thick and attached with 200-300 sixteen penny heavy screwnails. These end lining were sometimes impossible to pull. This problem was confined to the Sante Fe boxcars. Frequently, two men working together would be unable to remove the Sante Fe lining and the twenty-five pound lining bars had been bent in the process. Plaintiff himself had been previously injured removing lining on a Sante Fe boxcar with the use of a lining bar. The linings in other boxcars were easy to pull.

[2] The majority refers to the prejudicial effect of reference to defendant's billing other railroads for unnecessarily removing lining. This is not preserved for appellate review because not objected to by defendant during trial.

the injury for which damages are sought. *Rogers* v. *Missouri Pacific R. R.*, 352 U.S. 500, 507-508 (1957). The right of the jury to pass upon the question of fault and causality must be liberally viewed. *Chicago, R. Is. & Pac. R. R.* v. *Melcher*, 333 F.2d 996, 999[2] (8th Cir. 1964); *Elliott* v. *St. Louis Southwestern Ry.*, 487 S.W.2d 7, 10-11 (Mo. 1972); *Wilmoth* v. *Chicago, R. Is. & Pac. R. R.*, 486 S.W.2d 631, 634 (Mo. 1972). Concomitant to such principles, the questions of the relevancy of evidence has also been liberally viewed. Chicago, R. Is. & Pac. R. R. v. Melcher, *supra; Cereste* v. *New York, N.H. & H. R.R.*, 231 F.2d 50, 53-55[4] (2d Cr. 1956); *see, Reid* v. *Terminal R.R. Ass'n*, 306 S.W.2d 630, 632-33[1] (Mo.App. 1957).

In his petition, plaintiff alleged defendant was negligent in that:

> "(a) Defendant failed to provide reasonably safe working conditions when defendant knew or in the exercise of ordinary care should have known that said failure would reasonably likely cause substantial harm.
>
> "(b) Defendant failed to provide reasonably safe methods of work when defendant knew or in the exercise of ordinary care should have known that said failure would reasonably likely cause substantial harm.
>
> "(c) Defendant failed to provide reasonably safe equipment and work tools when defendant knew or in the exercise of ordinary care should have known that said failure would reasonably likely cause substantial harm.
>
> "(d) Defendant failed to provide adequate help when defendant knew or in the exercise of ordinary care should have known that said failure would reasonably likely cause substantial harm."

Given plaintiff's allegation of negligence, the breadth of relevancy in F.E.L.A. cases, and the definition of negligence[3] submitted by instruction No. 3, I believe the challenged deposition testimony pertains to the reasonableness of defendant's conduct under the circumstances, and it was within the sound discretion of the trial court to admit it.

I believe the majority construes plaintiff's pleaded theories of negligence too narrowly in order to find the challenged evidence not relevant. Evidence in an F.E.L.A. case which bears upon the question whether the railroad's method of repairing a boxcar is improper is relevant to the pleaded issues whether the railroad was negligent in failing to provide safe working conditions or safe methods of work. Reid v. Terminal R.R. Ass'n, *supra*. In the instant case, the challenged evidence bears upon plaintiff's claims that defendant's method of repairing the boxcar lining was improper; and, in finding the evidence irrelevant, the majority holds contrary to the policies reflected in Rogers v. Missouri Pacific R.R., *supra*.

Not only did the evidence demonstrate that the method used was improper and dangerous with the tools provided but there was an alternate method available whereby the lining was covered over the new lining. The utilization of this method avoids the strenuous pulling which requires the employees to "strain their guts" using their back, legs, and arms in order to remove the old lining and thus avoids the related risk of injury. Also by using this method there is no difference in the finished product. I the lining in the Sante Fe boxcar had not been unnecessarily removed, and had the alternative method of cover-

---

[3] Instruction No. 3 defined "negligence" as follows:

> "The term 'negligence' as used in these instructions means the failure to use that degree of care than an ordinary and prudent person would use under the same or similar circumstances."

ing it been utilized the plaintiff would not have been exposed to the hazardous and unreasonable risk of injury. I believe the challenged evidence was entirely relevant to the unsafe methods of work and working conditions which were pleaded by the plaintiff and were issues of negligence of the jury.

There was evidence this method of covering the lining as opposed to pulling it was utilized by railroads including Sante Fe, in repairing their own boxcars; and this method was not prohibited by regulations concerning repairs done on boxcars belonging to other railroads. In fact, Sante Fe uses the covering method on its cars quite often and it works well. There is nothing in the record to indicate that the condition of the particular boxcar in which plaintiff was injured required removal of the end lining and that the covering method could not be utilized.

It is interesting to note that at no time during trial did defendant object to plaintiff's evidence regarding the use of the alternative method of covering the lining rather than pulling it. In fact, defendant conceded that the procedure of covering over lining was an issue of negligence. This is demonstrated by the following colloquy between the attorneys and the court:

> "MR. FRIEDMAN [Plaintiff's attorney]: I intend to cover what the procedure was to cover over lining on the Frisco cars as an issue of negligence.
>
> "THE COURT: Is that the only other subject matter?
>
> "MR. FRIEDMAN: Yes, sir.
>
> "THE COURT: Any objection to this witness being called for that purpose?
>
> "MR. MORRIS [Defendant's attorney]: No. My witness will also say they cover over lining.
>
> "THE COURT: For that limited purpose, we'll hear the witness at this time.

> "Is that clear? Is the Court's ruling clear? We don't want to get into any other matters. The only subject we're allowing you to get into is this custom or practice to cover over linings. Do you understand the Court's ruling?"

Even if I were to assume for the sake of argument that the majority is correct in its conclusion that the evidence is immaterial or irrelevant, I surely could not conclude admission of the evidence was prejudicial to defendant so as to constitute reversible error. *Sanders* v. *H. & S. Motor Freight, Inc.*, 526 S.W.2d 332, 335[2] (Mo.App. 1975).

Certainly, the context of the challenged evidence would diminish any prejudicial effect of the evidence. The same witness who gave the challenged evidence also testified as follows:

> "Q. Gong back to another matter for just a minute. Was the lining any harder to pull, that didn't need to be pulled, in your opinion, as that did need to be pulled?
>
> * * * * *
>
> "A. The same."

The majority's decision notes the challenged testimony was not an isolated incident but a recurring theme throughout the trial. Plaintiff's counsel was permitted to argue, over objection, in opening argument that the evidence would show that upon numerous occasions it was not necessary to remove boxcar lining. However, upon objection, plaintiff's other references to the needlessness of the work were excluded. Further evidence upon the subject came in without objection as testimony (cross-examination) by a defense witness.

It is important to note that no reference was made to the needlessness of pulling boxcar lining in plaintiff's closing argument.

If the jury is properly instructed upon the law and the jury's verdict is within the properly admitted evidence, it is difficult to hold an erroneous admission of irrelevant evidence prejudicial. *Mills* v. *Keith Marsh Chevrolet, Inc.*, 549 S.W.2d 604, 608-609[9] (Mo.App. 1977). In the instant case, the jury was correctly instructed upon the issue of defendant's negligence, and the verdict finding negligence is within the evidence, not including the evidence challenged upon appeal.

Having read the voluminous transcript, I cannot find the quantum or nature of the challenged evidence was so collateral to the issues to have distracted or misled the jury from the true issues in the case.

The majority opinion disposes of other issues raised by appellants with the exception of two which the majority found unnecessary to decide. The first of appellants' contentions if that *Norfolk & Western Ry.* v. *Liepelt*, ____ U.S. ____, 100 S.Ct. 755 (1980), decided subsequent to the original decision in the instant case and upholding a jury instruction upon the exemption of F.E.L.A. awards from income taxation should be applied retroactively to hold the trial court erred in refusing defendant's proffered Instruction C. Appellants' contention has been rejected by this court in *Ingle* v. *Illinois Central Gulf R.R.*, #40300 (Mo.App. E.Dist., July 1, 1980), reargued with the instant case. The decision in Ingle v. Illinois Central Gulf R.R., *supra*, fully discusses the applicable law, and I heartily agree with its well-reasoned conclusion.

The second issue raised by appellants and not reached by the majority decision is that the trial court erred in denying defendant's motion for new trial based upon excessiveness of the jury's verdict. Only the trial court can find bias and prejudice on the part of the jury based solely on the amount of the verdict. If the trial court does not make such finding, an appellate court will defer to the exercise of the trial court's discretion in this regard. *Taylor* v. *F.W. Woolworth Co.*, 592 S.W.2d 210,

213 n.2[6] (Mo.App. 1979); *Stubbs* v. *Kansas City Terminal Ry. Co.*, 427 S.W.2d 257, 261[4] (Mo.App. 1968). For an appellate court to find that the trial court abused its discretion, the record must show some error was committed during trial, *Means* v. *Sears, Roebuck & Co.*, 550 S.W.2d 780, 788[10] (Mo. banc 1977), or some other incident occurred during trial which would have engendered bias or prejudice, *Webb* v. *Rench*, 476 S.W.2d 570, 573[2] (Mo. 1972); Taylor v. F. W. Woolworth Co., *supra.* I do not believe the record reveals any egregious error or unwarranted incident during trial which would establish that the verdict was a result of bias, passion, or prejudice by the jury.

My examination of substantial awards and injuries similar to those in the instant case does not compel the conclusion the instant verdict is manifestly unjust. In view of the jury's broad discretion in setting the award, approval of the award by the trial court, and considering the evidence in a light most favorable to plaintiff, I cannot conclude the verdict was excessive. *Woodford* v. *Illinois Cent. Gulf R.R. Co.*, 518 S.W.2d 712 (Mo.App. 1974); *accord, Bedwell* v. *Chicago, Mil., S.P. & Pac. R. R. Co.*, 509 S.W.2d 81 (Mo. 1974).

This was a hotly contested case which took six days to try and which resulted in a transcript of 888 pages. The jury found defendant negligent, and its finding and verdict are supported by the evidence.

I would affirm the judgment of the trial court. Further, I deem the majority's opinion to be contrary to the decisions of Luechtefeld v. Margulous, *supra,* and Lawson v. Cooper, *supra,* insofar as the majority hold defendant's trial objection preserved all aspects of prejudice argued upon appeal; Rogers v. Missouri Pacific R. R., *supra,* insofar as the majority narrowly construe the negligence pleaded by plaintiffs; and Mills v. Keith Marsh Chevrolet, *supra,* insofar as the majority hold the admission of the challenged evidence prejudicial to defendant.

Therefore, pursuant to Rule 83.01, I hereby order the instant case transferred to the Supreme Court.

Robert G. Dowd, Presiding Judge

APPENDIX C

SUPREME COURT OF MISSOURI
EN BANC

No. 62428

Ronald E. Dunn,
Respondent,

vs.

St. Louis-San Francisco Railway Company,
Appellant.

OPINION

(Filed June 8, 1981)

Appeal From The Circuit Court Of The City Of St. Louis
Honorable William A. Geary, Jr., Judge

Action for damages, under Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. et seq., for injuries sustained by Ronald E. Dunn while working as an apprentice carman for defendant, St. Louis-San Francisco Railway Company (Frisco). Jury returned verdict for plaintiff for $275,000 damages. The Missouri Court of Appeals, Eastern District, reversed the judgment and remanded for a new trial. Dissenting judges in that court certified the case to this Court. Rule 83.01.

Plaintiff was employed by defendant in Fort Smith, Arkansas as an apprentice carman and had completed one and one-half years of a four-year apprenticeship. A carman rebuilds and repairs boxcars, tankcars and flatcars. In the course of his job, a carman repairs wheels, gears, brakes and removes the wooden lining from the interiors of boxcars.

Boxcars are lined with tongue and groove boards or plywood sheets, nailed to stringers in the ends of the boxcars. A stringer is a four by four wooden board, sometimes oak and more frequently a softer wood, pine or fir. Its length is equal to the width of a boxcar. Stringers are bolted horizontally to the steel exteriors of the boxcars.

In Frisco's operation, the boxcar lining is removed, or "pulled", on K-1 track at its facility in Fort Smith. As cars from various railroads enter the train yard, an inspector routes them to designated tracks for appropriate repairs. The lead carman marks lining to be pulled from the cars assigned to K-1 track.

At the time of plaintiff's injury, a carman was given two tools to pull lining, a crowbar and a five to six foot long lining car, weighing twenty-five pounds and having a foot at one end. These tools ordinarily performed adequately to pinch, pry or pull. However, removal of the lining of cars for the Atchison, Topeka & Santa Fe Railroad often presented a problem. The end lining of the Santa Fe cars was built of two plywood sheets one inch thick, four feet wide and ten feet long, with thirteen inch strips between, and was attached with a large number of heavy screwnails. Often, two men working together could not remove the lining from Santa Fe cars. Lining bars had been bent in the removal process. The employees had complained for years about the problems and hazards of removing this type of lining. The carmen complained at their periodic safety meetings of the inadequacy of the tools furnished, but no other tools were provided by Frisco for Santa Fe cars. The employees had to "strain their guts" to pull this lining off, using their back, legs and arms. Sometimes the carmen would ask a laborer to run the forklift to assist in the pulling of lining. A clamp and chain were attached to the plywood lining and the power of the hydraulic system of the forklift pulled it. However, the forklift was not always available, and the carmen's supervisors discouraged its use. Defendant's evidence was that some supervisors considered the use of a forklift for this purpose dangerous.

On the date of his injury, Wednesday, October 23, 1974, plaintiff had removed the lining from four boxcars before he and journeyman carman Gary Marshall began work on a Santa Fe car. When he realized it was the heavy lining, plaintiff asked his supervisor, lead carman Leo Moss, for a forklift. However, Moss told him to use the lining bar. Plaintiff inserted his lining bar three feet from the floor, placed one foot on the floor and the other foot on the end wall, in a crouched position, and pulled. He then felt a sharp, shooting pain in his lower back. He tried to stand up, but was unable to rise to a straight, upright position. He told Gary he was hurt, rested ten minutes, then returned to pulling the lining. Thinking the pain would abate, he worked Thursday and Friday on a different assignment, checking and adjusting air brakes on the cars. Plaintiff did not report the injury to his supervisors or seek medical assistance on the job because he feared reprisal for reporting an on-the-job injury. There was evidence other employees, including supervisors, knew that he had been injured. After bedrest during the weekend, plaintiff reported for work on Monday. He could not work due to pain, was hospitalized, and eventually a ruptured disc was repaired surgically.

Appellant's first assignment of error is based upon the trial court's overruling of objections to deposition testimony of plaintiff's witness, Jerry Daniels, to the effect that appellant needlessly removed good lining from boxcars and replaced it with poor lining. Appellant contends that such evidence was beyond the scope of the pleadings, immaterial and irrelevant, and " * * * caused defendant to be placed in a bad light, in short, appear crooked, in the eyes of the jury on a false issue which was neither pleaded nor relevant to the case." (This was the assignment of error which was the basis for the reversal by a divided court of appeals.)

In his opening statement to the jury, counsel for plaintiff stated that Frisco removed and replaced linings on boxcars for other railroads for which "billings were substantial." When

plaintiff's counsel stated that on numerous occasions lining was unnecessarily removed, defense counsel objected that the decision as to what lining should be pulled was not an issue. Defense counsel responded, out of the hearing of the jury, that unnecessary work was done because Frisco wanted to increase their billing to other railroads and that plaintiff was injured while engaging in such work. Defense counsel restated his position that the decision as to what lining should be pulled was not related to any issue of negligence. The trial court overruled the objection " * * * at this time, * * * subject to specific objections in the course of the evidence."

Plaintiff's counsel then continued his opening statement, reiterating that lining was removed unnecessarily and stating, without further objection, that lining was replaced with "material * * * not as good as the materials they tore out and they only tore it out for billing purposes, to bill other railroads to increase the billing for the Frisco."

In his opening statement, counsel for defendant stated that Whirlpool, a shipper at Fort Smith, required boxcars to be in good shape on the inside for their products and Frisco had to put cars in shape so that Whirlpool would accept them, and it was necessary for Frisco to remove "rotten feed or something like that behind the plywood (lining) * * * ." Counsel also stated that " * * * when the cars are upgraded, it's correct, billing was done."

Plaintiff's case opened with the reading of a deposition of Gary Lee Marshall, a Frisco carman. When the questioning on the deposition came to the subject of billing by Frisco of other railroads for replacement of boxcar lining at the Fort Smith yards, an objection by defense counsel to such testimony was sustained. Marshall who was working with plaintiff at the time of his injury testified to the circumstances of that occurrence. His testimony included the statement: "the lining in these cars are (sic) pulled for several reasons. They are either broken,

decayed, or feed and debris behind the lining. And in order to raise the car from one class to another for higher class loading, this work has to be done. And that's the reason for pulling this lining."

Plaintiff then read the deposition testimony of Daniels, also a carman employed by Frisco at Fort Smith. Objection to his deposition testimony regarding Frisco's billing other roads for pulling linings was sustained. Also excluded was an early question and answer in which the witness expressed the opinion that Frisco would pull lining on foreign cars that was in better condition than that with which it was replaced.

Daniels did testify about the problems encountered in removing plywood lining from Santa Fe cars and possible alternative methods, involving the use of machinery, which had been suggested by carmen to their supervisors, on such work.

After direct, cross, redirect, recross, redirect, recross, redirect and recross-examination, the examination returned to redirect examination and got into billing by Frisco on lining pulled from foreign cars which the witness did not think needed to be replaced. Defense counsel's objection was that the examination " * * * touches the subject * * * that this carman did not think that the work done was necessary to be done in some instances and that the work was done to build up billing by the Frisco against other railroads * * * [T]his is not an issue in this case, does not touch the issue of negligence * * * and is not material or relevant to the issue of railroad negligence * * * ."

The court sustained the objections to the reading of the redirect and plaintiff's counsel then stated that he wished to read the recross. Defense counsel again objected, stating that his objection was the same as that made to the redirect. He reiterated that the matters involved were "not an issue * * * pertaining to negligence." When the trial court indicated that it would permit reading of portions of the recross, defense counsel

stated: "Can it be stipulated that my general objection as to whether or not this is an issue of negligence goes to all these questions which the Court permitted to be read?"

Plaintiff's counsel then read the following from the recross-examination:

"Q. Are you saying that the supervisors requested or told you fellows to do work that did not need to be done?

"A. Yes.

"Q. What have you seen? Now, be very specific about what you have seen.

"A. I've seen new end lining taken out and a poor grade put in.

"Q. Who would have written up that end lining?

"A. The lead man.

"Q. Has Mr. Moss retired?

"A. He has retired.

"Q. Is it your recollection that this was done while he was still the lead man?

"A. Yes.

"Q. So you have taken out linings that did not appear to you to have anything wrong with them, is that correct?

"A. Correct.

"Q. And you replaced that lining that you took out with other lining, is that right?

"A. Yes.

"Q. Now, what about the lining that you put in? I believe your testimony a while ago indicated that it might not be as good as the lining that you took out; is that right?

"A. In my opinion.

"Q. What was your opinion based on?

"A. Just appearance.

"Q. Was it old? I mean—was it scarred up?

"A. No.

"Q. Different thickness or what?

"A. Green, sap ridden, warped; it might have gaps between it after it hung.

"Q. Okay, now, I would like to know—in your best estimate—how many times you have done that; you now, that stuck out to you where the work really didn't need to be done?

"A. I couldn't say in numbers, but when we were doing the job heavy, back at the time of the accident, often.

"Q. Every day?

"A. Every day.

"Q. Did you ever pull out some of this lining that we've been talking about here, this tough lining, that didn't need to be pulled out?

"A. (No response.)

"Q. Were you ever ordered to write up that kind of lining for your report?

"A. Yes.

"Q. When you pulled out some of this inch plywood lining, what did you usually replace it with?

"A. Three-quarter inch, one by three and a quarter lumber.

"Q. You mean narrow boards?

"A. Narrow tongue and groove.

"Q. New?

"A. Yes.

"Q. Going back to another matter for just a minute. Was the lining any harder to pull, that didn't need to be pulled, in your opinion, as that that did need to be pulled?

"A. You're referring to the one-inch plywood?

"Q. Yes.

"A. The same.

(Questions and answers in the recross relating to billing were excluded by the court.)

It is the above quoted series of questions and answers which forms the basis for appellant's complaint.

This perhaps too great detail of what had occurred prior to and at the time of the reception of the objected to testimony is meant to show the basis of appellant's objection in the trial court, i.e., that the evidence did not relate to the negligence pleaded and was irrelevant and immaterial. At no point did defense counsel suggest to the trial court that the effect of the evidence would be to make the defendant appear dishonest. The failure to voice such objection does not preclude the defendant from asserting on appeal that such was the prejudice which the irrelevant or immaterial evidence produced when the evidence is "obviously prejudicial in character." Hungate v. Hudson, 353 Mo. 944, 185 S.W. 2d 646, 648-649[1-5] (1945).

Testimony that lining was unecessarily removed did have some conceivable relevance to the pleaded negligence of failure to provide safe working conditions, safe methods of work and reasonably safe equipment and work tools, given plaintiff's evidence of the difficulties encountered in the removal of Santa Fe car linings with the tools provided and methods followed. Unnecessary exposure to such difficulties would increase the risk of injury and thereby bear upon the negligence charged. Plaintiff's testimony was that he saw nothing wrong with the lining which he was pulling at the time of his injury, admitting of the inference that it was being pulled unnecessarily.

However, the relevancy of the replacement material to the negligence charged cannot be defended. The question is whether or not that testimony obviously made appellant appear crooked and dishonest. Appellant's motion for new trial points out that some further inference is required for that testimony to have such obvious effect. The assignment in the motion for new trial is that the trial court erred in permitting the reading of Daniels' testimony to the effect that defendant unnecessarily removed linings "and inferring that defendant engaged in such a practice for the purpose of increasing its billing to other railway companies for repairs. Said evidence was not relevant to any issue of defendant's negligence * * * ."

As above pointed out, prior to the ruling on the testimony now in question, the trial court had sustained objections to questions relating to Frisco's billing practices, so there was no evidentiary basis for the charge of an inference that the work was unnecessarily done in order to increase billings. The testimony which might have provided the basis for an inference of a dishonest motive in using inferior replacement lining having been excluded, the evidence complained of was not "obviously prejudicial."

Furthermore, for the testimony to be given the effect which appellant would assign it, the further inference must be drawn

that the witness was referring in his testimony to "foreign" cars. To remove good lining from its own cars and replace it with inferior would be a poor business practice but not necessarily dishonest. Note the witness's failure in this exchange to respond to the direct question: "Did you ever pull out some of this lining that we've been talking about, this tough lining, that didn't need to be pulled out?"

The caliber of the replacement materials was the subject of only the single brief reference above quoted. It did not become a diversionary issue. Although irrelevant and immaterial, the admission of that testimony may provide the basis for reversible error only if it had a material effect upon the merits of the case. Rule 84.13(b). No such effect can be accorded that testimony.

Appellant attempts to buttress its claim of error in the admission of the testimony by a question and answer in the cross-examination of defendant's witness Dale, a Santa Fe General Car Inspector:

> "Q. * * * You would be quite upset if they (Santa Fe) knew that good lining was being torn out of their cars and they were being billed for them?
>
> "A. Yes, sir.
>
> "Q. It's just not kosher, is it?
>
> "A. No, sir."

Although defense counsel had vigorously and successfully objected to questions and testimony designed to show that Frisco engaged in the practice of tearing out lining just for billing purposes, no objection was voiced to the questions asked Mr. Dale. This unobjected to exchange may not be relied upon as a basis for a finding of error on the part of the trial court in overruling the objection to the earlier testimony. With few exceptions, only matters which are brought to the trial court's attention and upon which a ruling of that court is at least sought provided the

basis for a finding of error on the part of the court. No complaint was made at the trial that Dale's testimony served to supply the prejudicial effect of the testimony previously admitted. Had the matter been presented, the trial court could, had it agreed, have taken remedial action as it did in other situations when the billing question arose. Upon the objections which were made in the trial court, that court did not err.

Defense counsel would excuse his failure to object to the questions to Dale on the grounds that objection "would have been futile because the issue was before the jury through Daniels' testimony." However, Daniels' testimony had not placed the billing issue before the jury. When plaintiff testified earlier that lining was removed "to get billing," defense counsel's motion to strike the testimony was sustained. In view of the trial court's consistent rulings on the billing issue when objection was raised, the absence of objection to the question posed to Dale may not be excused.

Defendant's second contention is that the trial court erred in admitting Dr. Thomas Banton's testimony concerning the manner in which plaintiff's claimed injury occurred and the details of plaintiff's past complaints because Doctor Banton first saw plaintiff 15 months after the claimed injury and his testimony is inadmissible hearsay. Doctor Banton testified that he examined plaintiff at counsel's request more than one year after the injury. He stated over objection that the history obtained from plaintiff was that he was pulling heavy items from a boxcar when he experienced low back pain. In response to a hypothetical question Doctor Banton testified that, based on reasonable medical certainty, plaintiff's medical problems were caused by the injury received on October 23, 1974, in pulling end lining.

There is no need to decide whether Doctor Banton's challenged testimony is hearsay or not because admission of the evidence, even if inadmissible, could not result in reversible er-

ror. The admission of evidence claimed to be hearsay is reversible error only if the complaining party is prejudiced. McDowell v. Southwestern Bell Telephone Co., 546 S.W. 2d 160, 161-162[1] (Mo. App. 1976); Fallert Tool & Engineering Co., Inc. v. McClain, 579 S.W. 2d 751, 758[14-16] (Mo. App. 1979). The complaining party cannot be prejudiced by the allegedly inadmissible evidence if that party offers evidence to the same effect as the challenged evidence, *McDowell,* or if the challenged evidence is merely cumulative to other admitted evidence of like tenor. *Fallert Tool & Engineering Co., Inc.;* Baker v. Woodbury, 492 S.W. 2d 157, 159[2-4] (Mo. App. 1973).

In this case, other independent evidence of the manner in which plaintiff sustained injury and plaintiff's past complaints had been introduced by both plaintiff and defendant. Plaintiff testified prior to Doctor Banton and stated that he was pulling with extreme force on the end lining when he felt low back pain that caused him to stop working. A coworker, Gary Marshall, who was assisting plaintiff in pulling the end lining, testified for plaintiff that plaintiff had stopped working, held his back, and told Marshall that he hurt his back. This evidence showed the circumstances surrounding the injury independent of Doctor Banton's testimony. Other physicians who testified for plaintiff stated plaintiff gave them the same history as related by Doctor Banton. In addition, defendant's witness, Dr. Paul Stohr, later testified to the identical facts, saying that plaintiff told the witness he injured his back pulling a large piece of plywood from the side of a boxcar.

Doctor Banton's testimony could not have prejudiced defendant and its second contention is without merit.

Defendant next contends the trial court erred in refusing defendant's tendered Instruction A withdrawing from the jury any consideration of a "foot drop" condition which plaintiff might develop. Defendant argues the testimony of plaintiff's doctors showed only a possibility, and not a reasonable medical

certainty, that the condition would occur and that the condition was not sufficiently related to plaintiff's injury to constitute an element of damages. Dr. Thomas Banton testified that his first examination of plaintiff revealed plaintiff had a weakness of the right great toe, which indicated damage to the fifth lumbar nerve. Dr. James Brown stated there was a possibility that plaintiff might develop foot drop and that, if an examination of plaintiff showed atrophy of the right leg, it would be due to a L5 nerve injury. Doctor Banton testified to the discovery of atrophy in plaintiff's right quadricep. Giving or refusing a withdrawal instruction is a matter directed to the discretion of the trial court, which discretion should be guided by the degree to which evidence has been introduced which might mislead the jury in its consideration of the case as it is pleaded. Sampson v. Missouri Pacific R.R. Co., 560 S.W. 2d 573, 584[9] (Mo. banc 1978). The doctors' testimony was not so extensive or inflammatory as to mislead the jury. The aggregate of the doctors' testimony shows that plaintiff had exhibited symptoms of atrophy and weakness which would support the theory of a foot drop condition. Therefore, the court did not abuse its discretion in refusing Instruction A.

Defendant's fourth contention is that the trial court erred in refusing defendant's tendered non-MAI Instructions B, D, and E because such instructions comported with federal law pertaining to F.E.L.A. and federal law governs in such cases.

Instruction B states:

> "The term negligent or negligence as used in these instructions means that failure to use that degree of care than [sic] an ordinarily careful and prudent person would use under the same or similar circumstances.
>
> "The defendant is not an insurer of the safety of its employees while they are on duty. The defendant is not held to absolute responsibility for reasonably safe condi-

tions, appliances, or methods of work; defendant's duty is to exercise ordinary care commensurate with the danger reasonably to be anticipated.

"The happening of an injury to plaintiff, standing alone, does not make defendant liable and it does not raise a presumption of negligence on the part of defendant.

"The duty of defendant is measured by what is reasonably foreseeable under the circumstances."

The first paragraph of Instruction B sets forth a definition of negligence which is approved by MAI 11.02 and which was given by the trial court below in Instruction 3. However, the second, third and fourth paragraphs of Instruction B are inconsistent with MAI and would be properly refused under MAI because the paragraphs are abstract statements of law requiring no finding by the jury, Anderson v. Sellers, 521 S.W. 2d 33, 37[2] (Mo. App. 1975), and the paragraphs incorrectly instruct the jury upon what the issues are not, rather than upon what the issues are. Wise v. Coleman, 360 Mo. 829, 230 S.W. 2d 870, 872 [1,2] (1950).

Any modification of an approved MAI instruction must be simple and brief, Rule 70.01(e), and shall not confuse and mislead the jury. Woodford v. Illinois Central Gulf Railroad Co., 518 S.W. 2d 712, 716 [6,7] (Mo. App. 1974). Instruction B does not conform to such standard.

Instruction D reads:

"Your verdict must be for defendant if you believe that the work plaintiff was performing was difficult but that defendant was not negligent.

"Defendant was not required to furnish plaintiff with the latest, best, or most perfect appliances with which to work, nor to discard standard appliances and tools already in use provided those tools and appliances in use were safe

and suitable. You may not find defendant liable merely because there may be a safer or easier method of performing the work in question."

Instruction D purports to converse the verdict director given in this case, Instruction 4, modeled upon MAI 24.01. Instruction D, however, is not in substantially the same language as that used in Instruction 4 and was, therefore, properly refused under MAI. Griffith v. St. Louis-San Francisco Ry. Co., 559 S.W. 2d 278, 281[2] (Mo. App. 1977), cert. denied, 436 U.S. 926 (1978).

Instruction E states:

"If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must therefore determine the present value or present worth of the money which you award for such future loss."

Instruction 7, a damages instruction authorized by MAI 4.01, was given in this case. Any further explanation of the MAI damages instruction by the tendered Instruction E is not acceptable procedure under MAI. McBee v. Schlupbach, 529 S.W. 2d 435, 439[2] (Mo. App. 1975); Jurgeson v. Romine, 442 S.W. 2d 176, 177[1-3] (Mo. App. 1969).

Thus, defendant's proffered Instructions B, D, and E were properly refused under MAI. Further, the circumstances or the guidelines set forth in Rogers v. Thompson, 308 S.W. 2d 688, 692[2] (Mo. 1958), would not indicate that the trial court's action interfered with federal rights. There is no compelling reason to limit application of the general rule that the form of instructions and manner in which the substantive law is submit-

ted to the jury in an F.E.L.A. case are procedural matters governed by state law. *Rogers;* 79 A.L.R. 2d 553, 572-573 (1961).

Defendant's fifth contention is that the trial court erred in refusing defendant's proffered Instruction C, which reads:

> "If your verdict is in favor of plaintiff, your award will not be subject to any income taxes and you should not consider such taxes in fixing the amount of your award."

Since the trial of this case, the United States Supreme Court decided Norfolk and Western Railway Company v. Liepelt, 444 U.S. 490 (1980). The Court held that a defendant in an F.E.L.A. case was entitled, as a matter of federal law, to an instruction substantially identical to that tendered by the defendant here, whether the case is tried in state or federal court. The problem presented by the assignment of error here is whether or not *Liepelt* is to be given retroactive effect so as to make the refusal of such an instruction error in a case tried before *Liepelt* was decided.

This question was before the Eastern District of the Missouri Court of Appeals in Ingle v. Illinois Central Gulf R. Co., 608 S.W. 2d 76 (Mo. App. 1980). In that case, the court applied the test of retroactivity laid down in Chevron Oil Co. v. Hudson, 404 U.S. 97, 106-107 (1971), and concluded that *Liepelt* should not be applied to make the refusal of such an instruction error in a case tried before *Liepelt* and decided, on appeal, subsequent to *Liepelt*. Application for transfer of Ingle was denied by this Court, as was application for certiorari to the United States Supreme Court (Illinois Central Gulf R. Co. v. Richard L. Ingle, No. 80-913, February 23, 1981).

This Court accepts the reasoning and conclusion of Ingle on this issue and holds that the refusal of the instruction in this case was not reversible error.

Defendant's sixth argument on appeal is that the trial court erred in prohibiting defendant's argument to the jury that any award for loss of future earnings should be reduced to present value and would not be diminished by any income tax.

Instructions upon the law of the case are the prerogative of the court, not of counsel. Counsel's argument is improper insofar as it undertakes to instruct the jury upon the law in addition to instructions given by the court. Doyle v. St. Louis-San Francisco Ry. Co., 571 S.W. 2d 717, 725[15] (Mo. App. 1978). Arguments concerning future disposition of any jury award in a negligence action are improper. See Price v. Bangert Bros. Road Builders, Inc., 490 S.W. 2d 53, 57[6] (Mo. 1973), (trial court properly refused counsel's argument that any award over $1,500 to an infant plaintiff would be held by the probate court until her majority). Further, the arguments proposed by defendant are devoid of evidentiary support upon the record before us and are, thus, improper. See McCormick v. Smith, 459 S.W. 2d 272, 278[3] (Mo. 1970), (mathematical formula for pain and suffering perforce improper). To the extent that *Liepelt* requires an instruction on the nontaxability of the award of damages, counsel may, of course, call to the attention of the jury the content of the court's instruction on the subject.

The trial court did not abuse its broad discretion to permit or limit argument of counsel. Norfolk & Western Railway Company v. Greening, 458 S.W. 2d 268, 273[7-9] (Mo. 1970); *Doyle* at 725[12-14].

Appellant attacks plaintiff's verdict-directing instruction on the grounds that it constituted a roving commission, being so vague and indefinite as to be meaningless in defining the issues to be decided by the jury. Appellant further complains that the ground of negligence submitted by the instruction was not supported by the evidence and failed to submit the issues actually tried.

Instruction No. 4 read as follows:

"Your verdict must be for the plaintiff if you believe:

"First, defendant failed to provide reasonably safe methods of work, and

"Second, defendant was thereby negligent, and

"Third, such negligence directly resulted in whole or part in injury to plaintiff.

"MAI-24.01, by plaintiff."

As appellant acknowledges, this instruction substantially followed MAI 24.01. Appellant's basic complaint is against the entire scheme of MAI as applied in F.E.L.A. cases. The reasoning behind the language employed in MAI 24.01 is explained in Ricketts v. Kansas City Stock Yards Co. of Maine, 484 S.W. 2d 216, 221-222[3] [4,6] (Mo. banc 1972). The submission in this case—'failed to provide reasonably safe methods of work'—defined the issue in accordance with the basic premise of MAI in submitting only ultimate issues and avoiding evidentiary detail in instructions. Plaintiff's theory was that the method of work imposed by defendant involved excessive reliance upon human strength and that the defendant rejected alternative methods which would have involved the use of mechanical devices rather than human strength. Defendant joined issue in this regard and sought to justify the method employed and to explain away the failure to employ alternative methods employing mechanical devices. The instruction did adequately submit the issue tried and the ground submitted was supported by evidence.

Appellant's final point is stated as follows:

"The Trial Court Erred in Failing to Set Aside the Verdict and Order a New Trial in This Case in That the Verdict Is So Grossly Excessive That It Is the Result of Passion and

Prejudice on the Part of the Jury. If the Court Believes the Rule of Uniformity Is Applicable, Then There Should Have Been in the Trial Court and Should Be in This Court a Remittitur of $100,000.00."

Evidence favorable to the verdict showed that plaintiff was 28 years of age at the time of his injury. His injury was a herniated disc which required surgical repair. He was hospitalized for 10 days in November, 1974, and spent 30 days thereafter in bed at home, in considerable pain. In June, 1975, his physician suggested that plaintiff return to light duty with the railroad, but defendant would not employ him on that basis. He had some income from light welding at home, but was unable to continue in that field of employment because of pain which would not permit him to stay on his feet.

Plaintiff was rehospitalized in November, 1975, because he "broke down." He came under psychiatric care and the psychiatrist was of the opinion that plaintiff's breakdown arose from the situation plaintiff found himself in because of his injury and operation, the pain and the questions concerning himself and his future.

The surgeon who performed the laminectomy testified that plaintiff had had a "bad result," would not be able to perform physical labor in the future and had incurred permanent physical limitation.

An examining physician shortly before the trial found limitation of lumbosacral range of motion, severe muscular spasm and atrophy of the right quadricep muscle.

In 1977, plaintiff worked for seven months for an armored car company at a wage about one third of what he would have earned on the railroad. He was forced to give up that work because the pain in his back and legs became so bad that he could not stand it.

On the basis of what railroad employees immediately above and immediately below plaintiff in seniority earned, plaintiff had lost approximately $35,000 in wages at the time of trial.

The complaint that the trial court should have set aside the verdict as excessive is directed to the discretion of the trial court. The rejection of such complaint by the trial court affords grounds for appellate relief only if the appellate court can find an abuse of discretion on the part of the trial court which may not be based merely upon the size of the verdict but must be founded upon trial error. Blevins v. Cushman Motors, 551 S.W. 2d 602, 614-615 [20][21] (Mo. banc 1977).

The trial incidents relied upon by appellant here were insignificant. For example, in cross-examination of a defense witness, counsel for plaintiff asked whether or not the witness knew of a written rule of defendant which says that an injured workman cannot return to light duty. When the witness responded that he knew of no such rule, plaintiff's counsel stated: "Either (sic) do I." The trial court, without request from defense counsel, reprimanded counsel for his voluntary remark and instructed the jury to disregard the remark. Defense counsel then moved for a mistrial which was denied. This incident would not support a finding of abuse of discretion in overruling the motion for new trial on the grounds that the verdict was the result of passion and prejudice.

Appellant also points to incidents in the final argument of plaintiff's counsel. With a single exception, the trial court sustained objections of defense counsel and granted the relief requested. The single exception was a request for mistrial based upon a remark that Frisco had failed to produce testimony from other carmen.

Considered neither separately nor collectively do these incidents rise to the nature of those which might call for relief in this Court on the basis here asserted.

Appellant suggests that a remittitur should be ordered "if the court believes the rule of uniformity is applicable." This Court would so believe only in response to a properly stated pint advancing such proposition. The point as stated presents nothing for appellate review.

Judgment affirmed.

Robert R. Welborn
Special Judge

Bardgett, C.J., Seiler, Welliver, Higgins, JJ., Stockard, Sp. J., and Ruddy, Sp. J., concur; Donnelly, Rendlen and Morgan, JJ., not sitting.

APPENDIX D

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

July 14, 1981

Mr. Daniel M. Buescher
906 Olive Street
St. Louis, Missouri 63101

In re: Ronald E. Dunn v. St. Louis-San Francisco Railway Co., a Corp.
Supreme Court No. 62428

Dear Mr. Buescher:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

/s/ Thomas Simon
Clerk.

cc: Mr. Newton C. McCoy
Mr. C. Marshall Friedman
Mr. Albert E. Schoenbeck
Legal Dept., Burlington
Northern Railroad, Inc.

APPENDIX E

[763] Instruction Conference

THE COURT: The court has indicated to counsel for both parties that it will give and read to the jury nine instructions. Instructions numbers one, two, eight and nine have been prepared by the court and will be read to the jury; instructions numbers three, four and seven have been prepared [764] by the plaintiff and will be read to the jury; and instructions numbers five and six have been submitted by defendant and will be read to the jury.

In addition to those nine instructions, the court has been tendered by defendant with six instructions which have been marked by the court, A through F, inclusive, which the court has indicated to the party will be refused.

On the subject of instructions, do you have anything for the record?

MR. FRIEDMAN: No, sir.

THE COURT: Mr. Morris, do you have anything for the record on the subject of instructions?

MR. MORRIS: I'll object to the Court in giving the instructions tendered by the plaintiff and given by the Court, and I would object to the Court refusing the instructions tendered by defendant and refused by the Court.

THE COURT: All pending objections are overruled and those nine instructions will be read.

Have you both looked at the verdict forms prepared by the court? Mr. Friedman, are you satisfied that those should be submitted to the jury?

MR. FRIEDMAN: Yes, your Honor, as far as I can see, they are.

THE COURT: Mr. Morris, are you satisfied?

MR. MORRIS: Yes, sir.

[765] THE COURT: Is there anything on the subject of argument that should be discussed at this time?

MR. MORRIS: I propose to tell the jury during final argument, your Honor, that the verdict is not subject to income tax, I support, that is in accordance with both state and federal law. Although it's not permissible to be instructed upon it, it is permissible, I submit, to be argued to the jury, and I propose to argue that.

I propose to argue, also, that the jury should consider the present value of any award that they may make to the plaintiff, that is, that he has immediate benefit of having the money in hand and that he has the opportunity to draw interest on it.

MR. FRIEDMAN: Your Honor, I would object to the argument pertaining to the income tax as injecting a false and misleading issue into this case, and getting into matters which are not properly in evidence, are not properly for the jury's consideration, through injection of such matters by the defendant in argument. The corollary would be that I should be permitted to argue to the jury that my fee will be deducted from the award, which is a contingent fee, and "x" dollars would be deducted from the award which are necessary under the code of ethics. And if such argument were permitted, it would be, in addition, a prejudicial matter and an irrelevant matter into the scope of the evidence and the instructions of the [766] court, and I think that would be highly immaterial and prejudicial.

THE COURT: The objection is sustained to the income tax and present value of money argument.

MR. FRIEDMAN: As to present value of money argument, my opinion would be that it's speculative, there's been no evidence introduced in this case about the present value of

money, and it would be telling the jury and getting into matters that should be testified to by an expert witness who is familiar with these matters, and I feel that a lay jury would not be in a position to properly return a verdict and assess damages in that matter, and that would be contrary to the instructions which we have, and contrary to the evidence in this case, and it's highly prejudicial.

MR. MORRIS: It's my intention, if the Court permits it, my intention to argue on present value, that on present value argument it would be possible that jurors can take the matter of common knowledge, take note of matters of common knowledge, and they would note that this money could be deposited and could get interest and dividends with this money; that I would argue that, for example, seventy-five thousand dollars, at seven-and-a-half percent a year interest would be around fifty-six hundred twenty-five dollars in interest.

THE COURT: Where do you get seven-and-a-half percent?

[767] MR. MORRIS: That's a matter of common knowledge, that's the interest rate in this area. Certainly a time deposit would pay seven-and-a-half percent, and a passbook would pay five point two five, and that is a matter of common knowledge; I would also submit and argue that plaintiff has the money at the present time to do with it as he sees fit, to make good deals on investment that might come up, and I submit that I would argue under the present value argument, that he would have the benefit of the money now, rather than get it a bit at a time over the years, and that he would not have immediate benefit of having the money.

THE COURT: That objection is sustained, and counsel is instructed that he will not argue those areas.

MR. MORRIS: I'm going to argue that he'll work, and I think that's a matter of evidence.

THE COURT: He said he was going to work.

MR. MORRIS: On the issue of speculative damages, I intend to argue that they can't award speculative damages, and I intend to argue that he did have a degenerated disc. That's also a part of the evidence.

THE COURT: If there's nothing further on the subject of argument, we'll take a short break before we go out to the courtroom.

(The trial was resumed before the jury as follows:)

(The Court read the following instructions to the jury, [768] Instruction No. 1 having been previously read as noted herein:)

INSTRUCTION No. 1

1. This case will proceed in the following manner:

First, the parties may each make an opening statement outlining the case.

Second, the plaintiff will first introduce evidence. At the conclusion of the plaintiff's evidence, the defendant has the right to introduce evidence. Rebuttal evidence may be introduced.

Third, at the conclusion of all the evidence, further instructions will be given you after which the attorneys may make their closing arguments, and then you will select a foreman, deliberate and arrive at your verdict.

2. Faithful performance by you of your duties is vital to the administration of justice.

3. The law applicable to this suit is given to you in these instructions and in other instructions that you will receive at the close of all the evidence in this case, and it is your duty to follow all such instructions.

4. It is your duty to determine the facts, and to determine them from the evidence and the reasonable inferences arising from such evidence, and in so doing you must not indulge in guesswork or speculation.

5. The evidence which you are to consider consists [769] of testimony of witnesses and the exhibits admitted in evidence. The term "witness" means any person, including a party who testifies either by written deposition or in your presence at the trial. The admission of evidence in court is governed by rules of law. From time to time it may be the duty of the attorneys to make objections and my duty as judge to rule on those objections and whether you can consider certain evidence. You must not concern yourself with the objections or the court's reasons for these rulings. You must not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken.

6. Opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and applying the law, but they are not evidence.

7. You must not be influenced in any degree by any personal feeling of sympathy for or prejudice against any party to this suit, for each party is entitled to the same fair and impartial consideration.

8. No statement or ruling or remark which I may make during the course of the trial is intended to indicate my opinion as to what the facts are. You are to determine the facts. In this determination, you alone must decide upon the believability of the evidence and its weight and value. In considering the weight and value of the testimony of any witness you may take into consideration the appearance, [770] attitude and behavior of the witness, the interest of the witness in the outcome of the suit, the relation of the witness to any parties to the suit, the inclination of the witness to speak truthfully or untruthfully, the probability or improbability of the witness' statements, and all other

facts and circumstances in evidence. Thus, you may give the testimony of any witness just such weight and value as you may believe the testimony of such witness is entitled to receive.

9. Until this case is submitted to you for your deliberation, you must not discuss this case with anyone or remain within hearing of anyone discussing it. After this case has been submitted to you, you must discuss this case only in the jury room when all memebers of the jury are present. You are to keep an open mind and you shall not decide any issue in this case until the case is submitted to you for your deliberation under the instructions of the court. MAI-2.01, by the court)

INSTRUCTION No. 2

In these instructions you are told that your verdict depends on whether or not you believe certain propositions submitted to you. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. The burden is upon plaintiff to cause you to believe the propositions necessary to support his claim against defendant. The burden [771] is upon the defendant to cause you to believe the propositions necessary to support his defense that plaintiff was contributorily negligent as submitted in Instruction No. 6. If the evidence in the case does not cause you to believe a particular proposition submitted o: if you are unable to form a belief as to any such propositions, then you cannot return a verdit requiring belief of that proposition.

(MAI-3.01, by the court)

INSTRUCTION No. 3

The term "negligence" as used in these instructions means the failure to use that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances.

(MAI-11.02, by plaintiff)

INSTRUCTION No. 4

Your verdict must be for the plaintiff if you believe:

First defendant failed to provide reasonably safe methods of work, and

Second, defendant was thereby negligent, and

Third, such negligence directly resulted in whole or in part in injury to plaintiff.

(MAI-24.01, by plaintiff)

INSTRUCTION No. 5

Your verdict must be for defendant unless you believe that defendant was negligent and that such negligence directly [772] resulted in whole or in part in injury to plaintiff.

(MAI-33.03, modified, by defendant)

INSTRUCTION No. 6

You must find the plaintiff contributorily negligent if you believe:

First, plaintiff attempted to remove the sheet of plywood by using his lining bar in a manner which he knew or by the use of ordinary care could have known was not reasonably safe, and

Second, plaintiff's conduct in the respect submitted in paragraph First was negligent, and

Third, such negligence of plaintiff contributed in whole or in part to cause his injury.

The term "ordinary care" as used in this instruction means that degree of care than an ordinarily careful and prudent person would use under the same or similar circumstances.

(MAI-32.07, modified; MAI-11.05, by defendant)

INSTRUCTION No. 7

If you find the issues in favor of the plaintiff, then you must award the plaintiff such sum as you believe will fairly and justly compensate the plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

[773] If you find the plaintiff contributorily negligent as submitted in Instruction No. 6, then you must diminish the sum in proportion to the amount of negligence attributable to plaintiff.

(MAI-4.01, modified; MAI-32.07, by plaintiff)

INSTRUCTION No. 8

The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

(MAI-2.02, by the court)

INSTRUCTION No. 9

You are instructed that nine or more jurors may return a verdict for either party in this case. If all of you agree upon a verdict, your foreman alone will sign it, but if your verdict is returned by nine, or more, and less than twelve jurors, your verdict must be signed by all of the jurors who agree to it.

(MAI-36.01, by the Court)

* * *

DEFENDANT'S REFUSED INSTRUCTIONS

INSTRUCTION No. A

The evidence that there is a possibility that plaintiff may develop a foot drop at some future time is withdrawn from the

case and you are not to consider such evidence in arriving at your verdict.

(MAI-32.04, modified, by defendant)

[774] INSTRUCTION No. B

The term negligent or negligence as used in these instructions means that failure to use that degree of care than an ordinarily careful and prudent person would use under the same or similar circumstances.

The defendant is not an insurer of the safety of its employees while they are on duty. The defendant is not held to absolute responsibility for reasonably safe conditions, appliances, or methods for work; defendant's duty is to exercise ordinary care commensurate with the danger reasonable to be anticipated.

The happening of an injury to plaintiff, standing alone, does not make defendant liable and it does not raise a presumption of negligence on the part of defendant.

The duty of defendant is measured by what is reasonably foreseeable under the circumstances.

(MAI-11.02, modified, by defendant)

INSTRUCTION No. C

If your verdict is in favor of plaintiff, your award will not be subject to any income taxes and you should not consider such taxes in fixing the amount in your award.

(Not an MAI, by defendant)

INSTRUCTION No. D

Your verdict must be for defendant if you believe that the work plaintiff was performing was difficult but that [775] defendant was not negligent.

Defendant was not required to furnish plaintiff with the latest, best, or most perfect appliances with which to work, nor to discard standard appliances and tools already in use provided those tools and appliances in use were safe and suitable. You may not find defendant liable merely because there may be a safer or easier method of performing the work in question.

(Not an MAI, by defendant)

INSTRUCTION No. E

If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must therefore determine the present value or present worth of the money which you award for such future loss.

(Not an MAI, by defendant.)

INSTRUCTION No. F

You are not permitted to award the plaintiff speculative damages by which term is meant compensation for future detriment which, although possible, is remote, conjectural or speculative. You can only award for future detriment if a preponderance of evidence shows such a degree of probability [776] of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury in question.

(Not an MAI, by defendant)

(See VOLUME III for continuation of transcript.)

APPENDIX F

Excerpts From Record

[538] MR. FRIEDMAN: At this time I'll read to the jury, and for the benefit of the record, the wage and tax employment record of the Frisco railroad for the employees who were mentioned in an answer to an interrogatory.

R. Brunk, Jr., 1974, $13,331.54;

James W. Staab, $11,653.73;

J. K. Daniels, $14,702.64;

D. B. Morris, $8,298.47;

A. R. Ward, $8,822.83;

J.D. Kelley, $8,291.48.

For 1975:

R. Brunk, Jr., $13,275.20;

J. W. Staab, $12,834.76;

J. K. Daniels, $12,990.41;

D. B. Morris, $10,312.75;

A. R. Ward, $9,935.33;

[539] J. K. Daniels, $9,433.39.

For 1976:

R. Brunk, Jr., $17,443.71;

J. W. Staab, $16,321.01;

J. K. Daniels, $17,436.27;

D. B. Morris, $16,675.97;

A. R. Ward, $15,088.43;

J. D. Kelley, $14,389.23.

* * * * *

Excerpts From Plaintiff's Closing Argument

[785] What you are to determine, and you are required under the law, not only to compensate Ron for the last three years and months since his injury, and what's he's gone through, but you are required to take a twenty-eight-year-old man and compensate him for the rest of his life, to the age of seventy-two—.

[786] MR. MORRIS: I'll object. There's no evidence of that. I ask the argument be stricken, and the jury instructed to disregard that.

THE COURT: The objection is sustained, and the jury is instructed to disregard that argument.

MR. FRIEDMAN: You are required to compensate him for the future, into the future of this man's life, for the remainder of his life, and you're required to decide what the proper compensation might be for forty or more years for a man's life. I'm giving you a figure that I think is a generous figure, but you are permitted to be generous. There is nothing under the Federal Liability Act which tells the jury that you may not be generous, and you are permitted to be generous, and I think generosity is warranted in this case, and that is, three hundred and seventy-five thousand dollars. That is a generous award, and I think a generous verdict in your hands is warranted in this case.

We have had evidence of wages, and Ron Dunn has had the testimony of Dr. Brown. What did Dr. Brown tell you — I did not realize that half of my argument has been concluded. I'll now sit down and I'll have an opportunity to come back and continue my review of the evidence with you following Mr. Morris' review of the evidence in this case.

* * * * *

[815] You heard his testimony in this case. He tried to do as much as he possible could. What can he do? He tried to work at

his job and could not. He was earning two thirty-five or two fifty-five an hour in that job. He was approximately earning a third of what he would have and should have been earning in the railroad had he not broken down his back. You heard the evidence. These employees are now earning close to twenty thousand dollars a year. You heard evidence and testimony that he was doing welding. He would weld ten or fifteen minutes and would have to stop and rest. You also heard the deposition of Mr. Fidler. What did he tell you. He testified, if we knew, if we knew he had a bad back, we would not have hired him. That was his testimony. Ron went around and around and around putting applications in and every employer turned a deaf ear. Through their own witness, if he would had put on that form he had a back injury, they would not have hired him. On the other hand, it was the best man he had. Does that tell you something about the character of an individual. This man's never been hurt before, he served in the navy from 1964 to 1966, and did hard work all his life trying to do what's right, and they send him out on that job and they say, what did we do wrong. They were warned in meetings, over and over and over again. "We need something to pull that lining or someone's going to get [816] hurt." Did they care? Did they show consideration to these employees? But yet they get up here and tell you, disregard that, just disregard that. Don't even consider that in assessing your damages. Don't think about his future. Don't think about the injury that this man has sustained. Don't think about the testimony of the witnesses in this case. Just disregard all of that and think about all the innuendoes and insinuations and this testimony that we have brought here, these untruths.

The Court has told you in Instruction number nine that nine of your number are required to return a verdict in this case. If nine of you agree on an amount in this case, nine of you can return a verdict. If there are three of you who accept this testimony, this argument from the railroad, so be it! I'm asking you, nine of you, and of course we hope that it's unanimous.

These forms of verdict require that they be signed by your foreman if you all agree upon a verdict, but if it's less than twelve of you, then the eleven or ten or nine of you have to sign it. We request that you sign the one, "We, the jury, in the above cause, find in favor of the plaintiff on the issues herein joined and assess his damages at the sum of...," and we're requesting you write in three hundred and seventy-five thousand dollars, and you can come back here proud that justice has been done in this case and God bless you!

* * *

[822] 12. The Court erred in refusing instruction lettered "C" offered by defendant for the reason that said instruction is a legal and valid instruction informing the jury that their award is not subject to income taxes and that they should not consider such taxes in fixing the amount of their award. Said instruction correctly states both the Federal and State law and the jury should have been so instructed, particuarly in a case such as the instant case where they were required to assess damages for a long period of time into the future and that part of their award included damages is lost earnings.

[823] 14. The Court erred in refusing instruction lettered "E" ofered by defendant in that said instruction is a conservative and proper statement of the Federal common law, originated by the Supreme Court of the United States, to the effect that a lump sum award for future earnings and wage loss must reflect the present value of those future wage losses and earnings. Said instruction is not a correct statement of the law and was absolutely vital in any proper instruction on the law of damages pertaining to this case.

* * * * *

RULING

[882] On February 10, 1978, Motion of Defendant for Judgment in Accordance with its Motion for a Directed Verdict at the Close of All of the Evidence, or, in the Alternative, for a New Trial, filed November 14, 1977, as amended November 29, 1977, is overruled and denied.

SO ORDERED: (Signed) William A. Geary, Jr., Judge (ENTERED, Feb. 10, 1978)

* * * * *

APPENDIX G

Excerpt From M.A.I.

SUPREME COURT ORDER

Rule 70 as hereby amended shall read as follows:

RULE 70. INSTRUCTIONS

70.01 APPROVAL OF INSTRUCTIONS—EFFECTIVE DATE—PUBLICATION PROCEDURE

Approval of instructions in civil actions will be made by order of this court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

70.02 INSTRUCTIONS TO JURIES

(a) WRITTEN INSTRUCTIONS—GIVING OR REFUSING. After a jury has been sworn to try a case but before opening statements the court must read to the jury Missouri Approved Instruction No. 2.01 which will be marked and given to the jury along with the other instructions at the close of the case but will not be reread by the court. Before the case is submitted the court shall call a conference of counsel to consider instructions. Any party may, before the case is submitted, request the court to instruct the jury in writing on the law applicable to the issues. The court may give instructions on its own motion. All instructions shall be submitted in writing and shall be given or refused by the court according to the law and the evidence in the case. All instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts. All instructions shall be read by the court.

(b) MISSOURI APPROVED INSTRUCTIONS EXCLUDE OTHERS. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

Opposition

Office-Supreme Court, U.
FILED
DEC - 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor in Interest by Merger to St. Louis-San Francisco Railway Company,
Petitioner,

vs.

RONALD E. DUNN,
Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION

C. MARSHALL FRIEDMAN
NEWTON G. McCOY
FRIEDMAN WEITZMAN
& FRIEDMAN, P. C.
The Advocate Building
1133 Pine Street
St. Louis, Missouri 63101
(314) 621-2200
Attorneys for (Plaintiff-) Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether the Missouri Supreme Court properly held the refusal of an income tax instruction was not prejudicially erroneous in a case in which the damages assessed were clearly justified by the evidence and in which the railroad was not precluded from offering relevant evidence of net (after tax) earnings?

2. Whether this Court may properly consider petitioner's contentions regarding the present value instruction when the judgment below on that point rests upon an independent and adequate state ground?

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Argument	3
Conclusion	23
Appendices:	
A. Missouri Supreme Court Rule 70	A-1
B. MAI 8.02	A-4
C. MAI 8.01	A-6

TABLE OF AUTHORITIES

Cases

Brown v. St. Louis Public Service Company, 421 S.W. 2d 255 (Mo. banc 1967)	4,18
Davis v. City of Independence, 404 S.W.2d 718 (Mo. banc 1966)	20
Dunn v. St. Louis-San Francisco Railway Company, 621 S.W.2d 245 (Mo.banc 1981)	1
Eustis v. Bolles, 150 U.S. 361, 14 S.Ct. 131, 37 L.Ed. 1111 (1893)	15

Flanigan v. Burlington Northern, Inc., 632 F.2d 880 (8th Cir. 1980), cert den., 450 U.S. 921, 101 S.Ct. 1370 (1981) 5,7

Henry v. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965)..... 15

Hodges v. Johnson, 417 S.W.2d 685 (Mo.App. 1967) .. 20

Howard v. Riley, 409 S.W.2d 154 (Mo. 1966) 21

Ingle v. Illinois Central Gulf Railroad Company, 608 S.W.2d 76 (Mo.App. 1980) cert den., 450 U.S. 916, 101 S.Ct. 1359 (1981) 5

Jurgeson v. Romine, 442 S.W.2d 176 (Mo.App. 1969).. 16

McBee v. Schlupbach, 529 S.W.2d 435 (Mo.App. 1975) 17

McCormick v. Smith, 459 S.W.2d 272 (Mo. 1970) 20

Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed. 2d 486 (1978) 15

Mince v. Mince, 481 S.W.2d 610 (Mo.App. 1972)..... 22

Murdock v. City of Memphis, 20 Wall. (87 U.S.) 590, 22 L.Ed. 429 (1875)..... 15

Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490, 100 S.Ct. 755 (1980) 3,4,19,20

Randall v. St. Albans Farms, Inc., 345 S.W.2d 220 (Mo. 1961)..... 22

Senter v. Ferguson, 486 S.W.2d 644 (Mo.App. 1972)... 4

State v. Patton, 77 S.W.2d 857 (Mo.App. 1934) 21

Walker v. Woolbright Motors, Inc., 591 S.W.2d 289 (Mo.App. banc 1979) 21

Rules

Missouri Supreme Court Rules of Civil Procedure Rule 70.02.....4,17,18,19

Missouri Approved Instructions

Missouri Approved Instructions (MAI) MAI 8.01..... 3,4

Missouri Approved Instructions (MAI) MAI 8.02..... 3,4

No. 81-736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor in Interest by Merger to St. Louis-San Francisco Railway Company,
Petitioner,

vs.

RONALD E. DUNN,
Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent accepts petitioner's statement of the opinions below with the exception that since the date of the docketing of the petition herein the opinion of the Missouri Supreme Court, Appendix C, page A-43 of the petition, has been published and is cited *Dunn* v. *St. Louis-San Francisco Railway Company*, 621 S.W.2d 245 (Mo.banc 1981).

JURISDICTION

Respondent accepts the first paragraph of petitioner's statement concerning jurisdiction but specifically denies, as will be set forth more fully below, that jurisdiction regarding Questions Presented No. 2, as set forth in the petition, is properly invoked or conferred upon this Court by 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner's statement of the case does not constitute a full and fair statement of the facts relevant to the issues herein. In order to avoid repetition additional relevant facts will be set forth under the appropriate point in the argument.

ARGUMENT

I.

The Writ Should Be Denied Because, Under The Circumstances Of The Instant Case, (Which Was Tried Prior To The Decision In Liepelt) The Missouri Supreme Court Properly Held The Refusal Of The Income Tax Instruction Was Not Reversible Error. The Damages Awarded By The Jury Cannot, By Any Stretch Of Imagination, Be Considered Excessive And Defendant Was Not Precluded From Offering Evidence Of After Tax Net Earnings. The Refusal Of The Instruction Was Completely Harmless And Was In No Manner Prejudicial. Further, And Contrary To The Implications Of The Petition, The Missouri Supreme Court Has Exhibited Scrupulous Fidelity To Liepelt By Modifying Its MAI FELA Damages Instruction To Comply With Liepelt.

Initially, respondent must take sharp exception to the statement contained in the Questions Presented, as set forth by petitioner, that "Missouri Courts have consistently refused to apply the federal substantive law of damages under the FELA to FELA actions tried in the state courts of Missouri." (Pet. at p. ii). That statement is inaccurate, unfair and clearly unwarranted, particularly with respect to the question of compliance with this Court's decision in *Norfolk & Western Railway Company* v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755 (1980). Immediately after the decision in *Liepelt* was rendered, the Missouri Supreme Court committee on Jury Instructions undertook the task of modifying the MAI FELA damages instructions to comply with *Liepelt*. The result, the currently applicable MAI 8.02, and MAI 8.01, appears as Appendix B and C to this Brief. MAI 8.02 and MAI 8.01 clearly instruct the jury that any award made "is not subject to income tax." The Committee's Comment (1981 Revision) to both instructions clearly indicates that the modification was designed to comply with *Liepelt*. Because the *Liepelt* modification is part of MAI 8.02 and 8.01, it is mandatory,

under Missouri law, that it be given in *all* FELA cases. Missouri Supreme Court Rule 70.02(b). Thus, in this regard, the Missouri Supreme Court has been most solicitous in guaranteeing an income tax instruction to FELA defendants since *Liepelt* itself held only that the instruction was required to be given only upon the defendant's request. 444 U.S. at ____, 100 S.Ct. at 760. (Blackmun, J., dissenting opinion). Further, deviation from MAI 8.01 or 8.02, when applicable, will be presumed to be prejudicial error by the Missouri Courts unless it is made perfectly clear that "no prejudice could have resulted from such deviation." *Brown* v. *St. Louis Public Service Company*, 421 S.W.2d 255, 259 (Mo.banc 1967). Respondent is aware of no case tried after the decision in *Liepelt* in which requested instruction that any award is not subject to income taxation was refused. Based upon the foregoing, respondent submits that petitioner has set forth these erroneous charges against the Missouri Courts in its statement of the Questions Presented for the sole purpose of distorting the true posture of the Missouri Courts in order to obtain review in this case.

The instant case, of course, was tried two and one-half years before this Court rendered its decision in *Liepelt*, at a time when Missouri, like a majority of other jurisdictions, prohibited instruction on income taxation. The instant case thus falls into an extremely narrow class of cases which were tried prior to *Liepelt* but in which all avenues of review had not yet been exhausted at the time *Liepelt* was handed down. With the foregoing in mind, the posture and significance of the instant case may be placed in proper perspective.

It should be noted, that at the time of this trial, two and one-half years prior to the date of the decision in *Liepelt*, Missouri Approved Instructions (MAI), Missouri State Court Rules of Civil Procedure and Missouri Appellate decisions forbade an income tax instruction such as that offered by petitioner. V.A.M.R. 70.02(b) and (c); *Brown* v. *St. Louis Public Service Company*, 421 S.W.2d 255, 259 (Mo.banc 1967); *Senter* v.

Ferguson, 486 S.W.2d 644 (Mo.App. 1972); *Ingle* v. *Illinois Central Gulf Railroad Company*, 608 S.W.2d 76, 83 (Mo.App. 1980), cert den., 450 U.S. 916, 101 S.Ct. 1359 (1981).

In affirming the plaintiff's judgment in *Ingle* v. *Illinois Central Gulf Railroad Company, supra*, despite the trial court's refusal to instruct the jury on the income tax question, the Missouri Court of Appeals, en banc, stated in part at 608 S.W.2d 83:

> "In the case at bar since the damages awarded are not excessive, it is difficult to imagine how the appellant has been prejudiced."

In the instant case, the Missouri Supreme Court, en banc, similarly affirmed respondent's judgment herein despite the refusal of the trial court to give the requested separate income tax instruction and stated:

> "This Court accepts the reasoning and conclusion of Ingle on this issue and holds that the refusal of the instruction in this case was not reversible error." 621 S.W.2d at 254, Petition at A-58.

In the instant case, the record and the Missouri Supreme Court opinion clearly demonstrate that the damages awarded by the jury in this case were in no manner excessive and that petitioner has been in no manner prejudiced. This factor was also emphasized by the United States Court of Appeals for the Eighth Circuit in *Flanigan* v. *Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), cert den., 450 U.S. 921, 101 S.Ct. 1370 (1981), cited and relied upon in the petition herein. In that case, the Eighth Circuit Court of Appeals affirmed the plaintiff's judgment despite the refusal of the trial court to give an instruction on income taxation and concluded at 632 F.2d 889-890:

> "The Supreme Court found in *Liepelt* the failure to give the cautionary instruction on nontaxation of the award

was error. However, the Court also found error in failing to allow the defendant railroad to prove through its economist the projected net earnings after taxes. On this combination of error, the Court found the error to be prejudicial requiring a new trial.

Jury instructions are subject to the 'harmless error' rule, *General Insurance Co. of America* v. *Hercules Construction Co.*, 385 F.2d 13, 24 (8th Cir. 1967), which requires reversal of a trial court judgment only if errors adversely affect the substantial rights of the complaining party. *Gilliam* v. *City of Omaha*, 524 F.2d 1013, 1015 (8th Cir. 1975); *Skogen* v. *Dow Chemical Co.*, 375 F.2d 692, 701 (8th Cir. 1967). Under this rule, it is also generally held that it is the appellant's burden to establish the prejudicial effect of the trial court's refusal to give a requested instruction. *General Insurance Co.*, 385 F.2d at 24.

In *McWeeney* v. *New York, New Haven & Hartford Railroad*, 282 F.2d 34 (2d Cir. 1960), the Second Circuit, in considering the prejudicial effect of a trial court's failure to give a nontaxability instruction, stated: 'Before an appellate court should hold that failure to give such a cautionary instruction was reversible error, there ought to be evidence either that juries in general increase recoveries on this account or that the particular jury did so.' Id. at 39. The appellant in *McWeeney* failed to show any indication that the jury had increased the recovery so the court refused to vacate the award.

This court in *Raycraft* v. *Duluth, Missabe & Iron Range Railway*, 472 F.2d 27 (8th Cir. 1973), indicated that the prejudicial effect of a failure to give a nontaxability instruction should be decided on the existence of evidence that the jury did, in fact, operate under a false impression of the tax laws. Id. at 33 n.10.

The Supreme Court in *Liepelt* was also greatly concerned with whether the jury increased the award on the misconceived notion that any award would be taxable. The *Liepelt* jury awarded the plaintiff $775,000 whereas the plaintiff's own economist testified to lost earnings of only $302,000. This large disparity between the evidence and the verdict greatly influenced the Supreme Court in deciding that the failure of the trial court to give a nontaxability instruction was prejudicial error. . . .

In the present case the railroad was not precluded from offering relevant evidence of net earnings. Additionally, the defendant has failed to point out any evidence that the jury inflated its award on the erroneous belief that the award would be taxable. In fact, the evidence fully supports the jury's verdict and indicates that the jury was not operating under any misconceived notions of tax laws. In the present case without evidence of an excessive verdict and considering all of the other relevant factors, we find the failure to give the instruction was not prejudicial to the rights of the parties. Under the present circumstances we hold the error was harmless." (Emphasis supplied)

It should be noted that in the instant case, as in *Flanigan*, the railroad was not precluded from offering relevant evidence of net earnings. There is no evidence that the jury award was inflated on the erroneous belief it would be taxable. And, in the instant case, the evidence fully supports the verdict, which is clearly in no manner excessive.

A review of the evidence presented at the trial will reveal the following. References are to the trial transcript. Prior to the injury of October 23, 1974, respondent had never experienced any back problems (T. 133-136, 142, 149). He had been employed by the railroad since December of 1970 and had been engaged in heavy physical labor (T. 133-137, 141, 142, 149). At the time of the injury, on October 23, 1974, respondent was tugging, jerk-

ing and yanking on the bar attempting to remove the plywood lining when he felt a sharp shooting pain in the lower part of his back (T. 192, 193). He could not stand straight up (T. 194). He continued working that day and the pain got worse radiating down his right leg (T. 195). That night he took aspirins and Doan's pills and laid on a heating pad, but it didn't help (T. 196). The next day he was in pain all day and did not sleep that night (T. 197). On Saturday and Sunday his condition got even worse (T. 200). Monday morning when he went to work he could not bear the pain and another employee helped him to his car (T. 201, 202, 700). He went home and his wife took him to the hospital (T. 201, 202). He was on the verge of passing out from the pain (T. 203). He was admitted to the hospital and remained in traction for one week (T. 203). He came under the care of a neurosurgeon, Dr. James A. Brown (T. 204). He was suffering from actue low back pain radiating to his right leg and was unable to walk, move, stand or bend (Plff's. Ex. 14; T. 330, 331, 732, 733). Following a regimen of conservative treatment which did not improve his condition, a myelogram was performed which revealed an anterior and bilateral identation on the column of L4-5 representing a midline herniation (T. 332, 333, 369-372). He underwent surgery to the lower back on November 7th and remained in the hospital until November 16th, mostly in bed (T. 206, 207). Following discharge he spent one month in bed at home and continued to experience considerable pain (T. 208, 209). He remained under Dr. Brown's care (T. 209). In June of 1975 Dr. Brown suggested that he try to return to light duty with the railroad (T. 209). Respondent went to see Mr. Snidow, the general foreman, and was advised that he could not return to work with the railroad (T. 210, 211, 613).

Respondent tried to do some light welding at home (T. 212-215). Some weeks he had no earnings, other weeks he earned a maximum of $25.00 to $50.00 (T. 212, 215). He experienced extreme difficulty and pain trying to weld. He would work a few

minutes and would have to sit down or lay down because of the pain (T. 213, 214). The pain was too great, he couldn't stand on his feet (T. 213, 214). Although he made application for employment with a number of companies, when they learned of his back injury no one was interested (T. 214). He was not making any money, could not get a job and bills were piling up (T. 215).

Respondent was rehospitalized in November of 1975 (Piff's. Exs. 15, 16; T. 215). He had gone to the end, he broke down, didn't know what he was going to do (T. 215). He came under the care of Dr. Donald F. Chambers, a psychiatrist (T. 215).

At the trial respondent testified in great detail as to the pain, disability and symptomatology which he experiences by reason of the injuries sustained (T. 216-223). He has never been free of pain since the initial injury (T. 215). He is in pain 24 hours a day (T. 222). He has problems sleeping, takes pain pills and relaxers (T. 222). He could do no more welding at the time of trial than he could immediately following surgery, approximately 5 to 10 minutes (T. 222, 223). He experiences severe back pain and pain down his legs; his hips and legs ache constantly (T. 217, 218, 222). He attempted to work as a driver for an armored truck service, however getting in and out of the truck was painful and he experienced constant leg aches (T. 218, 219). All activities caused pain (T. 219, 220). That employment was terminated after seven months because he could not hold up to the work any longer (T. 220, 221). The pain in his back and legs got so bad it was killing him, he couldn't stand it (T. 220, 221).

Dr. James A. Brown, one of respondent's treating physicians and a neurosurgon who completed his four year neurologic residency at the Mayo Clinic (T. 360, 361), first examined respondent on October 30, 1974 in Sparks Regional medical Center (T. 363). Dr. Brown performed a laminectomy on November 7, 1974 (Piff's Ex. 14; T. 333-335, 374-379), and he described the surgery in detail (T. 374-379). He could see marked

pressure against the L5 nerve root and it was very irritable (T. 375). If he barely touched the nerve, respondent's leg would jump (T. 375). He could see the herniation pushing into the nerve (T. 376, 377). When he opened the annulus and removed the disc, he observed that the herniation extended over towards the left side and he removed the disc material on the right and left side (T. 376, 377).

Dr. Brown continued seeing respondent following his discharge from the hospital for over a year through December of 1975 (T. 380). During 1975 respondent continued with muscle spasms and continued to have positive straight leg raising producing low back pain (T. 381). The pain was produced by the nerve that continued to be irritable (T. 381-382). Respondent also had more irritability of the sciatic nerve than usual (T. 382). Throughout 1975 he continued with pain in his lower back and pain in the right leg (T. 382, 383). Respondent was markedly limited in his activities because of the pain and he became very depressed during the course of the year because of the condition he had and because of the fact that he could not return to the type of work he had done in the past (T. 382, 383). He was very anxious about his condition and what he was going to do for a livelihood in taking care of his family (T. 382, 383). Toward the end of 1975 he had more problems with his depression and this was severe enough that Dr. Brown had to have one of the local psychiatrists help in terms of trying to control the situation (T. 382, 383). Dr. Brown testified that based upon his experience there was a definite relationship between respondent's emotional problems and depression and his injury and resultant inability to return to his normal occupation (T. 387, 388).

The area of respondent's injury, the L-5 level, has more stress applied than any other area of the back (T. 384). Following the kind of injury sustained by respondent, and the surgical procedures, adhesions or scar tissue form (T. 384, 385). It can be excessive and tend to bind the nerve down to the backbone as though it was glued to it, such that movement would put tension

on the nerve and produce pain (T. 385). Dr. Brown stated that was one of the reasons respondent has continued to have problems (T. 385). In addition, respondent has sustained nerve damage (T. 385, 386). The nerve damage plus the scarring are the reasons for respondent's continued difficulties (T. 385, 386). His condition is permanent (T. 386).

Dr. Brown testified that respondent has had a bad result (T. 386). Respondent will never be able to perform physical laboring type work in the future (T. 386, 387). He is only able to perform minimal activities involving standing, lifting and bending (T. 387). He will never be able to return to the railroad employment that he was previously performing (T. 387). There is nothing that can be done to help respondent (T. 387). He will have to live with his problem (T. 387). Respondent's condition could get worse (T. 389, 390, 413). His physical limitations are permanent, for the rest of his life (T. 412, 413).

The deposition of Dr. Chambers was obtained by respondent's counsel and read in evidence (T. 485). Also, the records of Sparks Regional Medical Center were admitted in evidence (T. 415). Dr. Chambers completed his residency in psychiatry at Washington University in St. Louis (T. 486). Respondent was under Dr. Chamber's care during his hospitalization of November and December, 1975 (T. 487). When he first saw respondent in the emergency room he was extremely distraught and really out of control (T. 487, 488). He had lost emotional control (T. 488). He was tearful, depressed and in a state of emotional collapse (T. 488). There was concern about suicide (Plff's Ex. 16; T. 488). Respondent's condition was one of pain medication, drug dependence, chronic pain and depressive reaction (T. 490, 496). Dr. Chambers testified that in his opinion respondent's emotional collapse came from the situation he found himself in because of the injury and operation, the situation with pain and with questions concerning himself and his future (T. 493, 512). He presented an intense psychiatric picture, with a really acute, severe emotional state,

just falling apart (T. 505). Respondent was there because he didn't have a choice, he was falling apart and was brought there (T. 506). He suffered an emotional breakdown (T. 511).

Dr. Thomas J. Banton, Jr., an orthopedic surgeon, who examined the respondent on a number of occasions over a two year period preceding the trial, testified at the trial (T. 419). His specialty involves diseases of the spine (T. 422). He performs routine lumbosacral surgery, spinal fusion and scoliosis surgery (T. 422, 423). Dr. Banton first examined respondent in January of 1976 (T. 437). Respondent stood with a list and his examination revealed paralumbar muscle spasm, restriction of lumbosacral range of motion in all planes, sciatic notch tenderness and weakness of the extensor hallicus longus (T. 437, 438). The weakness of the extensor hallicus longus was a definite test in muscle weakness for the L5 nerve root. It told him that there had been some damage to the 5th lumbar nerve (T. 437, 438). X-rays showed narrowing of the L4-5 interspace and he found irritation of the sciatic nerve and nerve damage disease (T. 438). Dr. Banton recommended that he not perform any heavy manual labor (T. 439). He re-examined respondent in July of 1976. At that time he found the same loss of motion and bilateral paralumbar muscle spasm (T. 440). He also found one-half inch atrophy of the right calf (T. 440). He concluded that respondent will never be able to perform heavy work as he had previously (T. 441). In April, 1977, Dr. Banton found that respondent had lost 50% of his range of motion (T. 442). He found severe paralumbar muscle spasm bilaterally and one-half inch atrophy of the quadricep muscles on the right (T. 442, 455, 456). Respondent's constant aching in the hip areas are residual pain from his nerve root damage (T. 443). He has nerve root irritation caused from adhesions and scar tissue and permanent damage to the nerve (T. 444).

Dr. Banton's last examination, one week before trial, revealed that respondent's condition was the same (T. 445). He testified that respondent's condition was permanent and that he

would anticipate no improvement (T. 446). Respondent will have continued future difficulty with his back (T. 447). Based upon his experience, he testified that respondent will probably have an increase in scar tissue and an increase in symptoms (T. 447).

Respondent has tried to do some welding on his own (T. 212). He repairs basketball rims or broken pitchforks or shovels (T. 212). Because of his back pain he works a few minutes and is then required to sit down or lay down (T. 213). Some weeks he has earned $25.00 to $50.00, other weeks he has earned nothing (T. 213, 214). He had no other income from October 23, 1974 until early 1977 (T. 214-218). During 1977 he worked for seven months for an armored truck service earning less than one-third the wages he would have earned on the railroad (T. 218-220, 537-539). He was required to terminate that employment because he could not hold up to the work any longer (T. 220, 221). The pain in his back and legs got so bad it was killing him, he couldn't stand it any longer (T. 220, 221). During 1976, respondent's contemporaries on the railroad were earning in excess of $16,000 anually (T. 439). Railroad earnings are increasing yearly (LT. 538, 539). From this evidence the jury was entitled to conclude that to the date of trial respondent had lost wages in excess of $35,000. Respondent was 28 years of age at the time of his injury and 31 years old at the time of trial (T. 132). Giving consideration to the foregoing, without considering any increases in wages, to age 65 respondent's earnings would have approached $550,000. Certainly, in considering a diminution of earnings, the jury would have been warranted in concluding that respondent's future diminished wage loss would have exceeded $250,000, for a total wage loss approaching $300,000. Obviously, respondent's wage loss was not the only loss sustained. The jury was required to compensate him for the pain and suffering that he has undergone and will undergo in the future. It was entitled to compensate him for his loss of his right to lead a normal and enjoyable life. The court and jury in

the instant case observed and heard that which cannot be placed in a cold transcript. One of the important elements in damages that does not appear in the transcript is the effect that the injuries, resultant loss of employment and resulting pain, worry and mental anguish have had upon Ronald Dunn. The havoc wrought by those conditions on him was plainly visible to the court and jury and evidenced by the total emotional collapse which he experienced. Those matters certainly must have had some influence in the decision reached. A proper review of the injuries and damages sustained by Ronald Dunn would assure that an unbiased and unprejudiced individual would find this verdict more than justified.

In this regard, it should be noted that the verdict returned by the jury was $100,000.00 less than that requested by plaintiff's counsel in final argument (T. 816, 817, 817A)

Based on the foregoing, it is absolutely clear that the verdict and damages assessed by the jury below, approved by the trial court and by numerous appellate courts below, can in no manner be considered excessive. Since the verdict was fully justified by the evidence and was not excessive, and considering all the other relevant factors set forth above, petitioner in the instant case has suffered absolutely no prejudice and there is no reversible error effecting the merits of this action present. For those reasons, the decision of the Missouri Supreme Court, "that the refusal of the instruction in this case was not reversible error", A-58, 621 S.W.2d at 254, must be regarded as entirely correct and proper and such decision certainly does not warrant review by this Court for the reasons set forth in the Petition for Writ of Certiorari.

II.

The Writ Should Be Denied Because This Court Is Without Jurisdiction Of Petitioner's Contentions Regarding The Separate Present Value Instruction In That The Missouri Supreme Court Rejected Petitioner's Contentions On An Independent And Adequate State Ground.

This Court is without jurisdiction of petitioner's contentions concerning the refusal of the trial court to give a separate "present value" instruction. Examination of the opinion of the Missouri Supreme Court on this issue, as well as the opinions of the Misosuri Court of Appeals, Eastern District, below, clearly indicate that the rejection of petitioner's claims was based upon an independent and adequate state ground which bars review in this Court. *Murdock* v. *City of Memphis,* 20 Wall. (87 U.S.) 590, 22 L.Ed. 429 (1875); *Eustis* v. *Bolles,* 150 U.S. 361, 14 S.Ct. 131, 37 L.Ed. 1111 (1893); *Henry* v. *State of Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965); *Michigan* v. *Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 1951 n. 7, 56 L.Ed.2d 486 (1978).

The basis of the independent and adequate state ground for rejection for petitioner's claims is set forth in the opinion of the Missouri Surpeme Court as follows:

> "Instruction 7, a damages instruction authorized by MAI 4.01, was given in this case. Any further explanation of the MAI damages instruction by the tendered Instruction E is not acceptable procedure under MAI. *McBee* v. *Schlupbach,* 529 S.W.2d 435, 439[2] (Mo.App. 1975); *Jurgeson* v. *Romine,* 442 S.W.2d 176, 177[1-3] (Mo.App. 1969).
>
> Thus, defendant's proffered Instructions B, D, and E were properly refused under MAI. Further, the circumstances or the guidelines set forth in *Rogers* v. *Thompson,* 308 S.W.2d 688, 692[2] (Mo. 1958), would not in-

dicate that the trial court's action interfered with federal rights. There is no compelling reason to limit application of the general rule that the form of instructions and manner in which the substantive law is submitted to the jury in an F.E.L.A. case are procedural matters governed by state law. *Rogers*, 79 A.L.R.2d 553, 572-573 (1961)." (Petition A-57, 621 S.W.2d at 253)

Examination of one of the cited cases, *Jurgeson* v. *Romine*, 442 S.W.2d 176 (Mo.App. 1969), more fully reveals the basis for the Missouri Supreme Court's opinion. In that case, a damage instruction authorized by MAI was given by the Court. The defendant in that case, rather than seeking to submit a proper modification of the MAI instruction, offered a separate damage instruction, Instruction No. 8 which was refused by the Court. In rejecting the defendant's contention on appeal that it was error to refuse the separate damage instruction, the Court held as follows:

"Furthermore we presume defendant offered Instruction No. 8 pursuant to the rule generally observed before the adoption of M.A.I. that 'Where an instruction on the measure of damages, though general, is not erroneous in its general scope, its generality does not constitute error and if the defendant fears such instruction may be misunderstood he must submit an explanatory or modifying instruction or he will not be heard to complain.' Raymond, Missouri Instructions, Sec. 132; Brunk v. Hamilton-Brown Shoe Company, Mo., 66 S.W.2d 903, 909. Samuels v. Illinois Fire Insurance Co., Mo.App., 354 S.W.2d 352, 362(20). However, Supreme Court rule 70.01(b), which has been effective since January 1, 1965, provides:

'Whenever Missouri Approved Instruction contains an instruction applicable in a particular case which the appropriate party requests or the court

> decides to submit, such instruction shall be given to the exclusion of any other on the same subject.'
>
> We take it that this applies to measure of damages instructions. The Jack L. Baker Companies, Inc., v. Pasley Manufacturing and Distributing Company, Mo., 413 S.W.2d 268, 273 (5,6). The old rule authorizing separate damage instructions for plaintiffs and defendants should no longer be followed. If the offered Instruction No. 3 did not clearly submit the issues in this case, it should have been modified so that it would do so. The trial court did not err in refusing Instruciton No. 8." 442 S.W.2d at 177

Again, in *McBee* v. *Schlupbach*, 529 S.W.2d 435 (Mo.App. 1975), the Court reversed and remanded for a new trial on the issue of damages when a separate instruction offered by the defendant was offered and given in addition to the applicable MIA damage instruction. In that case, the MAI instruction fairly submitted all of the damage issues in the case and the separate instruction argumentatively emphasized elements contained in the defendant's converse verdict direction Instruction No. 5.

These conclusions follow directly from the literal language of Missouri Supreme Court Rule 70.02, dealing with jury instructions, which is set forth in full as Appendix C hereto (The excerpt from Rule 70.02 set forth in the Petition is not complete.)

Rule 70.02(b) provides:

> "*(b) Missouri Approved Instructions Exclude Others.* Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject."

Rule 70.02(e) provides:

> "*(e) Guide for the Form of Instructions Where MAI Not Used. Where an MAI must be modified to fairly submit the issues in a particular case,* or where there is no applicable MAI so that an instruction not in MAI must be given, *then such modifications* or such instructions *shall be simple, brief, impartial, free from argument,* and shall not submit to the jury or require findings of detailed evidentiary facts." (emphasis supplied)

Thus, under Missouri law, it is quite clear that if petitioner in the instant case deemed the damage instruction given by the Court to be inadequate because it contained no reference to present value, the proper procedure under Missouri law would have been for petitioner to have prepared a modified version of the MAI damage instruction embodying a brief, simple and impartial modification rather than the separate damage instruction which it offered and which was refused. The principle that separate damage instructions are not permitted under MAI is well established, uniformly applied, and well known to all members of the Missouri Trial Bar. It should also be noted that the railroad made no specific objection to the damage instruction given by the Court at trial or in its motion for new trial.

Missouri's procedural rules regarding Missouri Approved Instructions (and the form of instruction where a modification of a Missouri Approved Instruction is required) are supported by a legitimate, if not a compelling, state interest. That interest was set forth by the Missouri Supreme Court in *Brown* v. *St. Louis Public Service Co.*, 421 S.W.2d 255, 257 (Mo.banc 1967), as follows:

> "This court, by its adoption of Missouri Approved Instructions, promulgated precise approved instructions. These had been drafted after much research and great effort on the part of the court's special committee and its able reporter, the late Professor John S. Divilbiss. A preliminary draft was distributed and suggestions were

received from the bench and bar before final adoption. *The system was devised to eliminate the old system of complex, detailed and frequently argumentative instructions which caused great difficulty for jurors, lawyers and judges, and resulted in a high percentage of reversals on account of instructions given or refused. The special committee carefully considered the precise words to use in each approved instruction in order to provide simple, concise and understandable instructions.* Directions as to the format to be followed were given to cover those instances where no MAI instruction is provided or where the facts of a case require modification of an MAI instruction. When an MAI instruction is applicable, its use is mandatory." (Emphasis supplied)

An example of the proper method of modifying MAI instructions as well as an example of the fidelity of the Missouri Courts to the pronouncements of this Court with respect to damages in FELA cases is illustrated by changes recently made in the MAI FELA damage instructions in order to comply with this Court's opinion in *Norfolk & Western Railway Company* v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755 (1980). Prior to the *Liepelt* decision, MAI practice did not permit the jury to be instructed concerning the income tax consequences of a jury award. Following *Liepelt*, the MAI instruction was modified by adding the following sentence to the body of the instruction:

"Any award you make is not subject to income tax." (Appendix B and C).

By adding this sentence to the body of the MAI damage instruction in FELA cases, proper MAI procedure has been followed. No separate damage instruction is necessary to comply with *Liepelt* and the modification to the MAI instruction is brief, simple and impartial as required by Rule 70.02(e). We note, parenthetically, that in changing this instruction, MAI has gone beyond what the United States Supreme Court required in

Liepelt. In *Liepelt*, this Court held that the defendant is entitled, upon request, to an income tax instruction. However, by including the income tax modification in the MAI damage instruction, the Missouri Courts now require that the jury be advised concerning the income tax consequences of the jury award in every case, not only those in which the defendant requests such an instruction, in that it is mandatory under Missouri law that the applicable MAI damage instruction be given to the jury in every case.

With respect to the present value issue, petitioner attempts to bolster its argument by asserting that it was improperly prevented from arguing the question of present value in summation to the jury. However, as observed by the Missouri Supreme Court, such argument was devoid of evidentiary support. Petitioner made absolutely no effort to properly introduce evidence, by expert testimony or otherwise, which would instruct the jury in the manner in which it might arrive at the extremely complicated present value computations.

It is axiomatic that arguments of counsel must be based upon evidence introduced at the trial and that counsel should neither argue nor draw inferences from matters not in evidence. *McCormick* v. *Smith*, 459 S.W.2d 272 (Mo. 1970); *Davis* v. *City of Independence*, 404 S.W.2d 718, 720 (3) (Mo.Banc 1966); *Hodges* v. *Johnson*, 417 S.W.2d 685, 689 (1) (Mo.App. 1967). With regard to defendant's proposed argument on present value, defense counsel advised the court that he intended to argue that money could be deposited and earn interest and dividends at 7½% a year (T. 776) and that plaintiff could make "good deals" on investments (T. 767). He further advised the court that interest rates "in this area" were a matter of common knowledge (T. 767). The evidence, of course, established that plaintiff is not a resident of "this area", but is rather a resident of Arkoma, Oklahoma (T. 139). The interest rates, dividends and investment returns which defense counsel proposed to argue were in no manner supported by any evidence introduced

in the trial. No actuary testified, nor was there any evidence of any kind presented in the trial with regard to these matters.

In *Howard* v. *Riley*, 409 S.W.2d 154, 157 (3) (Mo. 1966) the following was stated:

> "The discussion between counsel and the court which occurred outside the presence of the jury preceding argument of the case to the jury could not have been prejudicial to the defendant, even assuming that the trial court was wrong in view of the law expressed by him as to the right to offer explanation of the plea of guilty. *Counsel could only argue the evidence which had been received,* and as heretofore indicated, there simply was no evidence, either received or offered, which in any sense constituted an explanation . . . Consequently, there was nothing of that kind for counsel to argue to the jury. *There can be no error in denying a right to argue evidence which is not available for argument.*" (Emphasis Added)

See also *State* v. *Patton*, 77 S.W.2d 857, 858 (Mo.App. 1934).

The same rule is applicable to jury instructions, including damage instructions, under Missouri law. For instance, in *Walker* v. *Woolbright Motors, Inc.*, 591 S.W.2d 289 (Mo.App.banc 1979), the Missouri Court of Appeals, Southern District, en banc, reversed a judgment because a damage instruction had been given which submitted issues upon which the jury had not been given evidence. In this regard, the court held:

> "As defendant urges here on appeal, since no evidence existed from which the jury could find the issues as submitted by Instruction No. 5, it was error to give the charge. 'There is nothing more firmly entrenched in the law than the requirement that issues submitted in instructions to the jury be supported by evidence from which the jury could reasonably find such issue. "An instruction which is not supported by the evidence is erroneous in that it is

misleading and confusing." ' *Brassfield* v. *Sears*, 421 S.W.2d 321, 323 (Mo. 1967); *Dickey Company, Inc.* v. *Kanan*, 537 S.W.2d 430, 434[7] (Mo.App. 1976)."

The same is true here. Under current conditions, even highly qualified experts are unable to make accurate predictions concerning interest rates. A lay jury cannot reasonably be expected to properly arrive at the "present value" of any sum unless given some information and testimony to assist it.

Finally, it should also be noted that defense counsel at no time requested the trial court to take judicial notice of any of the matters sought to be argued to jury. See *Randall* v. *St. Albans Farms, Inc.*, 345 S.W.2d 220, 223 (3,4) (Mo. 1961); *Mince* v. *Mince*, 481 S.W.2d 610, 614 (15) (Mo.App. 1972).

Since there was no evidentiary basis which in any manner supported the proposed argument or separate damage instruction, they were, in the trial court's discretion, properly refused. In ruling, the trial court instructed defense counsel that he should not argue the areas unsupported by evidence (T. 767). Plaintiff's counsel did not specifically request the jury to award a sum for future loss of earnings. Defense counsel did proceed to argue the value of a reduced lump sum award (T. 805, 806). Clearly, no prejudicial error resulted from the ruling of the court. It should also be noted, parenthetically, that defendant's counsel made no objection to any of the portions of plaintiff's final argument on damages described in petitioner's statement of the case in this Court.

For all of the foregoing reasons, it is evidence that the decision of the Supreme Court of Missouri was based upon a completely independent and adequate state ground. For that reason, this Court is without jurisdiction of the questions which petitioner seeks to present for review.

CONCLUSION

For all of the foregoing reasons, plaintiff (respondent) respectfully submits that the judgment of the Missouri Supreme Court, en banc, below, is entirely correct and that the same does not warrant review by this Court. For that reason, it is further respectfully submitted and urged that the Petition for Writ of Certiorari in the instant case should be denied.

Respectfully submitted,

C. MARSHALL FRIEDMAN
NEWTON G. McCOY
FRIEDMAN WEITZMAN
& FRIEDMAN, P.C.
The Advocate Building
1133 Pine Street
St. Louis, Missouri 63101
(314) 621-2200

Attorneys for (Plaintiff-) Respondent

APPENDIX

APPENDIX A

MISSOURI SUPREME COURT RULE 70

Rule 70. Instructions

Rule 70.01. Approval of Instructions—Effective Date—Publication Procedure

Approval of instructions in civil actons will be made by order of this court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

Rule 70.02. Instructions to Juries

(a) Written Instructions—Giving or Refusing. After a jury has been sworn to try a case but before opening statements the court must read to the jury Missouri Approved Instruction No. 2.01 which will be marked and given to the jury along with the other instructions at the close of the case but will not be reread by the court. Before the case is submitted the court shall call a conference of counsel to consider instructions. Any party may, before the case is submitted, request the court to instruct the jury in writing on the law applicable to the issues. The court may give instructions on its own motion. All instructions shall be submitted in writing and shall be given or refused by the court according to the law and the evidence in the case. All instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts. All instructions shall be read by the court.

(b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party

requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

(c) Violation of Rule—Effect. The giving of an instruction in violation of the provisions of this Rule shall constitute error, its prejudicial effect to be judicially determined. However, the use of an approved instruction or following notes on use before the effective date shall not be presumed to be error.

(d) Marking—Use of and Filing. Each instruction shall be submitted with an original and one copy for the court and one copy for each party. Each copy shall indicate whether it was prepared at the court's direction or by which party it was tendered and shall contain a notation as follows:

"MAI No. ____" or "MAI No. ____ modified" or "Not in MAI" as the case may be. Original instructions which are refused shall be so marked by the court and filed with the clerk. Original instructions which are to be given shall be consecutively numbered and all shall be given as instructions of the court. Except where otherwise provided in Missouri Approved Instructions, they shall be given in such order as the court shall deem advisable. All instructions given shall be carried by the jury to their room and returned and filed at the conclusion of their deliberations. All instructions refused and all instructions given, including a record of who tendered them and the "MAI" notation, shall be kept as a part of the record in the case.

(e) Guide for the Form of Instructions Where MAI Not Used. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

(f) Instruction Directing Verdict—Converse Instruction. Instructions may be given, authorizing a verdict for a defendant,

upon finding the converse of any essential fact or element essential to a verdict for plaintiff. The request of a converse instruction shall not be deemed to waive any objection to the instruction conversed.

Rule 70.03. Objections to Instructions

Counsel need not object to any instructions to be given at the request of any other party or by the court on its own motion or to the refusal of any instructions requested by such party. Specific objections to instructions shall be required in motions for new trial unless made at trial. The making of objections during trial shall not preclude making additional objections to the same or other instructions in the motion for new trial. No general objection to instructions is required.

APPENDIX B

MAI 8.02

8.02 [1981 Revision] Damages—F.E.L.A.—Injury to Employee

If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained [and is reasonably certain to sustain in the future]1 as a result of the occurrence2 mentioned in the evidence. Any award you make is not subject to income tax.

Notes on Use (1978 New)

Caution: If contributory negligence is submitted, the damage instruction must be modified by adding the following:

> "If you find plaintiff contributorily negligent as submitted in Instruction Number ____, then you must diminish the sum in proportion to the amount of the negligence attributable to plaintiff."

See MAI 32.07 for the appropriate contributory negligence instruction in a F.E.L.A. case.

1. This bracketed phrase may be added if supported by the evidence.

2. The term "occurrence" must be modified by substituting some descriptive term which specifically describes the compensable event in any case where the evidence discloses more than one event which is claimed to have caused plaintiff's injury or damages. For example, if the plaintiff claims that he was injured in a fall which occurred at work but the defendant claims that the injury did not result from the fall but rather resulted from a non-compensable automobile accident, the instruction should be modified to read "as a result of the fall on December 15 (the date of the compensable event)."

Committee's Comment (1981 Revision)

This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplication of MAI 4.01 with two exceptions. The word "direct" is deleted from the fifth line of MAI 4.01. This is required in an F.E.L.A. case so that the instruction complies with the correct substantive law, *Wilmoth* v. *Rock Island Ry.*, 486 S.W.2d 631 (Mo. 1972); *Crane* v. *Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 314 (1969); and *Rogers* v. *Mo.Pac. Ry.*, 352 U.S. 500 (1957). The reference to taxation is used in F.E.L.A. cases in compliance with *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980). *Accord: Ingle* v. *Illinois Central Gulf R.R. Co.*, 603 S.W.2d 32 (Mo.App. 1980). [608 S.W.2d 76 (Mo.App. 1980)]

MAI (3rd Ed.) at pp. 106-107

APPENDIX C

MAI 8.01

8.01 [1981 Revision] Damages—Death of Employee Under F.E.L.A.

If you find in favor of the plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate (list the beneficiaries; i.e., the widow, minor children, parents, etc.) for (her, his, their) losses which can reasonably be measured in money which you believe (she, he, they) sustained as a direct result of the death of (name of decedent) [and if you believe decedent endured pain and suffering directly resulting from his injuries then in addition you must add to such sum an amount that would have fairly and justly compensated decedent for such pain and suffering.][1] Any award you may make is not subject to income tax.

[You must not consider grief suffered by reason of the death.][2]

Notes on Use (1981 Revision)

Caution: If contributory negligence is submitted, the damage instruction must be modified by adding the following:

> "If you find decedent contributorily negligent as submitted in Instruction Number ____, then you must diminish the sum in proportion to the amount of the negligence attributable to decedent."

See MAI 32.07 for the appropriate contributory negligence instruction in an F.E.L.A. case.

1. Submit this only when supported by the evidence. For example, it is obviously inappropriate in sudden death cases.

2. This sentence may be added at defendant's option.

Committee's Comment (1981 Revision)

This instruciton is used only in an F.E.L.A. case wherein the employee was fatally injured. The reference to taxation is used in F.E.L.A. cases in compliance with *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980). *Accord: Ingle* v. *Illinois Central Gulf R.R. Co.*, 603 S.W.2d 32 (Mo.App. 1980). [608 S.W.2d 76 (Mo.App. 1980).]

Library References

C.J.S. Master and Servant §§ 538, 548.

West's Key No. Digests, Employers' Liability (key symbol) 261.

MAI (3rd ed.) at p. 105